No. 77-1419

In the Supreme Court of the United States

OCTOBER TERM, 1977

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

SOCIALIST WORKERS PARTY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Solicitor General,
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Assistant Attorney General,
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CITATIONS

258-736—78

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The Solicitor General, on behalf of the Attorney General, the United States of America, the President of the United States, the Director of the Federal Bureau of Investigation, and the other defendants,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

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[1] The other defendants named in the amended complaint include the Secretary of the Treasury, the Secretary of Defense, the Director of Central Intelligence, the Director of the Secret Service, the Director of the Defense Intelligence Agency, the Postmaster General, the Secretary of the Army, the Commissioners of the Civil Service Commission, and "unknown agents of the United States Government."

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–11A) is reported at 565 F. 2d 19. A prior opinion of the court of appeals (App. B, *infra*, pp. 12A–21A) is reported at 510 F. 2d 253. The district court did not render an opinion concerning the present issues; a prior opinion of the district court (App. E, *infra*, pp. 24A–38A) is reported at 387 F. Supp. 747.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 22A) was entered on October 11, 1977. A timely petition for rehearing was denied on March 9, 1978 (App. D, *infra*, p. 23A). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Attorney General must submit to a citation for contempt of court in order to obtain appellate review of a district court's order that he reveal presumptively privileged documents to an adversary in litigation.

STATUTES INVOLVED

1. 28 U.S.C. 1291 provides in relevant part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court.

2. 28 U.S.C. 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT

1. "This action was commenced in 1973 by the Socialist Workers Party (SWP), the Young Socialist Alliance (YSA) and several individual members of those organizations. Their second amended complaint, which seeks both injunctive relief and some $40 million dollars [*sic*] in compensatory and punitive damages from the United States and various officials and employees, recites a litany of alleged wrongful acts on the part of [petitioners] beginning in 1938, including blacklisting, harassment, disruption, wiretapping, mail tampering, breaking and entering, and assault" (App. A, *infra*, pp. 1A–2A). The case has not gone to trial, and the principal disputes to date have concerned the status and identity of informants who have given information to the Federal Bureau of Investigation concerning the respondents.

The district court initially enjoined all informants from attending a meeting of YSA (App. E, *infra*, pp. 24A–38A). The court of appeals reversed that decision (App. B, *infra*, pp. 12A–21A), concluding that the use of informants does not violate any constitutional right of respondents and that the injunction posed the threat of "serious prejudice to the Government from compromising some or all the informants for all time, even though the final determination of the action may be for [petitioners]" (*id.* at 20A). Mr.

Justice Marshall denied an application for a stay, explaining that "the Court of Appeals has analyzed the competing interests at some length, and its analysis seems to me to compel denial of relief." 419 U.S. 1314, 1319.

In the district court, respondents "have had broad discovery by way of interrogatories, depositions and production of documents" (App. A, *infra,* p. 2A). "Approximately seventy thousand documents have been turned over to [respondents] by governmental agencies" (*id.* at 2A n. 1). Respondents have sought, in addition to the materials they already have received, the names of all the persons who on more than one occasion have provided information to the Federal Bureau of Investigation concerning respondents' activities. There are more than 1,300 such persons, and we argued in the district court that "the government's ability to gather information for general law enforcement purposes would be severely damaged by disclosure" of the names of informants (*id.* at 2A).

The district court ordered the FBI to furnish it with the names and files of 19 informants. It examined these files but declined to determine whether they were privileged or even whether respondents had established a strong showing of need for the names. Instead, although the judge stated that he was " 'reasonably convinced that the identity of the individuals in all, virtually all, cases would be useless to [him] as a judge or to the parties to the litigation' " (App.

A, *infra,* p. 3A), the court ordered the FBI to turn all of the files over to counsel for respondents.[2] The court stated "that production would not stop with the eighteen [*] files but would undoubtedly go beyond and might encompass the full thirteen hundred informant files" (*id.* at 3A–4A)..

2. The petitioners filed an appeal and sought a writ of mandamus. The court of appeals held that the disclosure order is not an appealable final decision within the meaning of 28 U.S.C. 1291, and it declined to issue a writ of mandamus. The court began with the premise that interlocutory review of discovery orders is ordinarily unavailable and that it would intervene only if the complaining party could show "persistent disregard of the Rules of Civil Procedure[,] a manifest abuse of discretion * * * [or] where the case presents legal questions of first impression or of extraordinary significance" (App. A, *infra,* p. 4A). The court concluded that none of these standards is satisfied here because the scope of the informants' privilege is not a novel issue and because "it is by now well-established that a district judge * * * may permit opposing counsel to participate in and assist him in the conduct of *in camera* proceedings under a pledge of secrecy" (*id.* at 8A). The court acknowledged that "some other circuits have taken a

[2] "The lawyers were ordered to keep the information which they secured confidential" (App. A, *infra,* p. 4A).

[*] When it became clear that the identity of one informant had been publicly disclosed, the documents concerning that informant were furnished to respondents.

more liberal position with regard to the reviewability of interlocutory orders of the type involved herein" but stated that "we are bound to follow this Court's strong policy against review" (*id.* at 10A–11A).

Although it did not reach the merits, the court of appeals pointed out that the identities of informants are presumptively privileged and that "the strength of the privilege is greater in civil litigation than in criminal" (App. A, *infra,* p. 6A). Moreover, the court stated, "[d]isclosure should not be directed simply to permit a fishing expedition * * * or to gratify the moving party's curiosity or vengence" (*id.* at 7A). The court expressed "concern that the course upon which the district judge has embarked will lead to disclosure for which there is no substantial need * * * and to unnecessary rummaging in government files. * * * Although disclosure in small servings effectively precludes appellate review, it does not make the end result more palatable to either the defendants or the public" (*id.* at 9A).

The court of appeals observed that "the identification of informants, once made, will be irreversible on an appeal from the final judgment" (App. A, *infra,* p. 9A), and that, because respondents may well have "no valid cause of action" (*id.* at 9A) and the statute of limitations may be an absolute defense, "a decision as to the need for discovery of much privileged matter can be deferred safely until more fundamental issues, perhaps dispositive of the need, are decided on trial" (*id.* at 10A). The court accordingly stated that "[w]e are far from convinced that [respondents'] attorneys require a wholesale disclosure of informants' identities in order to prepare their case for trial" (*id.* at 10A; footnote omitted) and wrote that it was "hopeful that the district judge will give full consideration to the thoughts here expressed" (*id.* at 11A).

3. While our petition for rehearing was pending in the court of appeals, several conferences were held in the district court. The district court announced that it was prepared to rule that nine of the files were protected by the privilege and that nine should be disclosed, but only if petitioners would forego any further appellate review. When we suggested further possible compromises, the district court announced that these were unacceptable and that it would insist on production of all 18 files in full. Counsel stated that we would consider accepting sanctions under Fed. R. Civ. P. 37—such as allowing every material fact respondents sought to acquire through discovery to be deemed admitted—in lieu of discovery, but the district court responded (February 22, 1978 Tr. 27–28):[4]

> * * * I will state to you and to the FBI that as far as I can see now it is not tolerable or acceptable to this Court to be told that the FBI will defy the order of the Court and accept what you call sanctions.
>
> The purpose of discovery is not to lead to sanctions, it is to lead to discovery. The purpose of the Court order * * * is to get the order obeyed and I think you better reconsider any suggestion, even in advance, of the thought of sanctions. It will not be acceptable to me.

[4] The district court spoke for itself without soliciting the views of counsel for respondents.

> As long as you have suggested it, I want to give you advance notice that I will seriously consider contempt or imprisonment of defiant officials, and I am sure you are aware of that, but I will not hesitate to use that power if there is a willful defiance of a final order of this Court. [5]

REASONS FOR GRANTING THE PETITION

1. As a rule, parties to litigation must either comply with a discovery order or accept sanctions for disobedience. Appellate review is unavailable either by appeal (*United States* v. *Ryan*, 402 U.S. 530) or by mandamus (*Kerr* v. *United States District Court*, 426 U.S. 394). Persons who disagree with the district court's decision may elect to comply, in which event the dispute comes to an end. They may accept sanctions under Fed. R. Civ. P. 37 and appeal any final judgment based on the sanctions.[6] Or they may be adjudicated in contempt and appeal the penalties imposed. This rule serves the purposes of avoiding piecemeal litigation (with its attendant delay) and of weeding out claims and objections by persons who are unwilling to take the risk that they may be wrong.

But the Court also has recognized that the customary rule need not be applied inflexibly. Claims of

[5] Because the files are in the custody of the Department of Justice and are subject to the control of the Attorney General, any order of contempt must run against the Attorney General personally. *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462.

[6] That is how the claim of privilege reached this Court in *United States* v. *Reynolds*, 345 U.S. 1.

privilege cannot be evaluated under the ordinary rules of procedure, because "[c]ompliance could cause irreparable injury [and] appellate courts cannot always 'unring the bell' once the information has been released." *Maness* v. *Meyers*, 419 U.S. 449, 460. And courts do not construe the presumption against piecemeal litigation in a way that causes unnecessary conflict between coordinate branches of the government. *United States* v. *Nixon*, 418 U.S. 683, 690–692. In light of these and other considerations, at least two courts of appeals allow the Executive Branch to obtain review, by appeal or mandamus, of orders requiring executive officials to disclose assertedly privileged materials to an opponent in litigation. *Usery* v. *Ritter*, 547 F. 2d 528 (C.A. 10); *United States* v. *Hemphill*, 369 F. 2d 539 (C.A. 4). The court of appeals here acknowledged (App. A, *infra*, pp. 10A–11A) that its decision conflicts with the holdings of those other circuits. This Court should resolve that conflict.

The Executive Branch has been required in recent years to interpose an increasing number of claims of privilege to requests for discovery in suits involving allegations of misconduct by executive officials. Whether the privilege involved is the privilege for state secrets that might affect the national security or, as here, the more common privilege concerning the confidentiality of informants, the assertion of privilege raises the unwelcome prospect of friction between the Executive and Judicial Branches. That friction would

be needlessly aggravated if a cabinet officer must decline to comply with a judicial order simply in order to activate the process of appellate review. It should not be necessary for a district court to hold the Attorney General, the Nation's highest law enforcement officer, in contempt of court before an appellate court will determine whether the district court erred in requiring the disclosure of assertedly privileged information.[7]

Similar considerations led the Court to conclude in *United States* v. *Nixon, supra,* that the President need not be cited for contempt of court before obtaining appellate review of an order requiring him to disclose assertedly privileged information. The Court's analysis applies here as well (418 U.S. at 691–692):[8]

> The requirement of submitting to contempt * * * is not without exception * * *. * * * [T]he traditional contempt avenue to immediate appeal is particularly inappropriate due to the unique setting in which the question arises. To require [the Attorney General] of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government. Similarly, a federal judge should not be

[7] Any contempt order in this case would be addressed to the Attorney General personally. See note 5, *supra.*

[8] We have substituted "the Attorney General" for "a President" in the quotation to demonstrate that the reasoning is applicable to either officer of the Executive Branch.

> placed in the posture of issuing a citation to [the Attorney General] simply in order to invoke review. The issue whether [an Attorney General] can be cited for contempt could itself engender protracted litigation, [*] and would further delay both review on the merits of his claim of privilege and the ultimate termination of the underlying * * * action for which his evidence is sought.

The Attorney General is prepared not to comply with the district court's order in this case, if that should be necessary in order to permit appellate review of the order. But it would be pointless to require the Attorney General to take that formal step, which could lead only to confrontation between two branches of the government. Moreover, it would be unseemly for the chief law enforcement officer of the United States, sworn to uphold and obey the law, publicly to disobey a court as the price of obtaining review of a ruling he believes to be both unsound and certain to harm the proper functioning of Government. Where, as here, the Attorney General personally has determined that the documents are covered by a valid privilege, and the Solicitor General has determined that the matter deserves immediate appellate review,[10]

[9] See *United States ex rel. Touhy* v. *Ragen, supra.*

[10] The Solicitor General must approve all appeals or requests for extraordinary writs by executive officials. 28 C.F.R. 0.20(b). The Solicitor General authorizes applications for interlocutory relief only when he believes that the issue is of substantial importance to the United States or when the district court is clearly incorrect. This screening serves to protect appellate courts from the merely dilatory applications that sometimes are filed in private litigation and ensures that cases are not needlessly delayed.

the courts should entertain the request of the Executive Branch that the case be decided on its merits.[11]

2. Appellate review is especially appropriate here, because the district court so plainly has abused its discretion. This Court has held that informants are essential to effective law enforcement and that their identities should not needlessly be revealed. Even in a criminal case, the informants' identities should be revealed only when that is "essential to a fair determination of a cause." *Roviaro* v. *United States,* 353 U.S. 53, 61. See also *Weatherford* v. *Bursey,* 429 U.S. 545, 557. The procedure established by the district court here is not even colorably "essential to a fair determination" of this case.

The district judge acknowledged that he was " 'reasonably convinced that the identity of the [informants] in all, virtually all, cases would be useless to [him] as a judge or to the parties to the litigation' " (App. A, *infra,* p. 3A). This statement is an acute assessment of the case. Petitioners acknowledge that from 1960 to 1976 approximately 1,300 informants relayed information to the government about respondents, and that approximately 300 of these informants were members of the SWP and YSA. The

[11] Our position is not inconsistent with *Kerr* v. *United States District Court, supra. Kerr* did not involve any potential for conflict between two branches of the federal government. Moreover, the Court observed in *Kerr* that petitioners could apply for and receive *in camera* review of the assertedly privileged materials (426 U.S. at 405–406). Here, by contrast, the district court has declined to make any ruling after *in camera* review concerning the claim of privilege, and the court has emphasized that it will not heed the court of appeals' request to reconsider its decision (see pages 7–8, *supra*).

way in which these informants were used has been exhaustively canvassed in discovery that has included nine sets of interrogatories directed to the FBI, the depositions of at least 18 federal officials, and the disclosure of more than 70,000 documents (*id.* at 2A n. 1).

Perhaps there would be a good argument for disclosure if the names of the informants were essential elements of respondents' case. But respondents may not even have a case. The statute of limitations may extinguish many of the claims here, others may fail because the Federal Tort Claims Act forbids recovery on any claim sounding in assault, misrepresentation or deceit (28 U.S.C. 2680(h)),[12] and still others may fail because the use of informants is not an invasion of any constitutional right.[13] If the court were to agree with any or all of these arguments, that would eliminate any significant need for further discovery.

As the court of appeals put it (App. A, *infra,* p. 10A), "a decision as to the need for discovery of much privileged matter can be deferred safely until more fundamental issues, perhaps dispositive of the need,

[12] See also *Powell* v. *Dellums*, petition for a writ of certiorari pending, No. 77–955, in which we argue that supervisory law enforcement officers should be absolutely immune for exercising their discretion to order law enforcement activity that is later determined to be improper.

[13] See, *e.g.*, *Weatherford* v. *Bursey*, *supra; Hoffa* v. *United States*, 385 U.S. 293; *Lewis* v. *United States*, 385 U.S. 206. Indeed, in an earlier opinion in this very case, the court of appeals stated that the "FBI has a right, indeed a duty, to keep itself informed with respect to the possible commission of crimes," and it quoted with approval the statement of another court that " '[t]he use of informers and infiltrators by itself does not give rise to any claim of violation of constitutional rights' " (App. B, *infra*, p. 18A).

are decided on trial." There is no reason why the district court should direct disclosure of informants' identities in advance of determining that the disclosure is necessary and in advance of considering legal questions that would obviate any need for discovery.[14]

[14] The district court did not order the materials to be disclosed directly to respondents; it instead ordered disclosure only to respondents' attorneys. We have serious doubts about the propriety of that procedure, and the court of appeals' statement (App. A, *infra*, p. 8A) that "it is by now well-established that a district judge, in the exercise of his discretion, may permit opposing counsel to participate in and assist him in the conduct of *in camera* proceedings under a pledge of secrecy" is simply wrong. See *Black* v. *Sheraton Corp. of America*, 564 F. 2d 531, 542–545 (C.A. D.C.) (district court must resolve claim of privilege *in camera;* disclosure to plaintiff's counsel improper except as a last resort). The court of appeals referred to *United States* v. *Nixon*, *supra*, 418 U.S. at 715 n. 21, as support for its statement, but the note in *Nixon* dealt only with disclosure to the Special Prosecutor, an official of the Executive Branch. The Court did not sanction disclosure outside the government in advance of resolution of the claim of privilege, and it certainly did not approve wholesale delivery of files to counsel in advance of a finding, as a result of *in camera* inspection, that additional assistance was needed concerning a particular document or portion of a document.

In any event, the difference between disclosure to counsel and disclosure to the parties is not of great significance here. One of respondents' attorneys is a member of the SWP (App. A, *infra*, p. 3A n. 3), which brought this suit "on behalf of its past and present members" (Amended Complaint, p. 2). And, as the court of appeals observed (*id.* at 10A n. 4): "while we share the trial judge's confidence in the character and integrity of [respondents'] counsel, we are less sanguine than he concerning their ability to conceal the information which is about to be disclosed to them. Indeed, unless counsel are prohibited from making use of the information thus obtained, the very thrust of their future inquiries may point interested observers directly to many of the [informants] involved." And if counsel were to be prohibited from making use of the information they learn, then there would be no reason why they should have access to it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General.
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APRIL 1978.

258-736—78——3

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IN RE UNITED STATES OF AMERICA, PETITIONER

SOCIALIST WORKERS PARTY ET AL.,

PLAINTIFFS-APPELLEES,

v.

THE ATTORNEY GENERAL ET AL.,

DEFENDANTS-APPELLANTS.

(No. 1562, Docket 77-3041)

Argued Aug. 19, 1977.

Decided Oct. 11, 1977.

Before VAN GRAAFEILAND and WEBSTER,* Circuit Judges, and DOOLING, District Judge.**

VAN GRAAFEILAND, Circuit Judge:

This action was commenced in 1973 by the Socialist Workers Party (SWP), the Young Socialist Alliance (YSA) and several individual members of these organizations. Their second amended complaint, which seeks both injunctive relief and some $40 million dollars in compensatory and punitive damages from the United States and various officials and em-

*Of the Eighth Circuit, sitting by designation.

**Of the Eastern District of New York, sitting by designation.

ployees, recites a litany of alleged wrongful acts on the part of the defendants beginning in 1938, including blacklisting, harassment, disruption, wiretapping, mail tampering, breaking and entering, and assault. Plaintiffs have had broad discovery by way of interrogatories, depositions and production of documents.[1] This has disclosed that since 1960 some thirteen hundred unidentified persons have provided information concerning plaintiffs on at least two occasions to the FBI and, of these, approximately three hundred were at one time members of SWP or YSA, or both. This appeal concerns the disclosure of their identities.

From the outset of discovery, plaintiffs have insisted that they would be satisfied with nothing less than the names of all informants. They contend that the informants would not be endangered by this disclosure and that, because the investigation of SWP and YSA has been terminated, the informants no longer provide a continuing source of information to the government which should be preserved. Defendants have just as adamantly asserted that none of the informants should be identified, contending that the government's ability to gather information for general law enforcement purposes would be severely damaged by disclosure in this case and that plaintiffs have failed to show that their need for disclosure outweighs the public interest in encouraging the flow of information from confidential sources.

[1] Approximately seventy thousand documents have been turned over to plaintiffs by governmental agencies, approximately fifty-three thousand of these by the FBI. Nine sets of interrogatories have been directed to the FBI alone. At least eighteen depositions have been taken, twelve of them of FBI employees.

The district judge, faced with an almost insoluble problem, has had difficulty in coming to grips with it. The matter was brought to a head by plaintiffs' motion for an order directing the FBI to furnish the names of eighteen informants, theretofore identified only by code numbers, and to produce all documents relating to them. The district judge conducted an *in camera* inspection of the twenty-five file drawers of documents involved in this request, directed the government to prepare summaries of the files, and set forth a list of subjects which he wanted covered in the summaries. He stated that it might be necessary for the government to provide plaintiffs with similar information relating to all the informant files and indicated his belief that this could probably be done without any substantial revelation of the identity of informants, because he was "reasonably convinced that the identity of the individuals in all, virtually all, cases would be useless to [him] as a judge or to the parties to the litigation."

Plaintiffs' counsel reasserted, however, that plaintiffs were unwilling to settle for anything less than disclosure of the names of all informants, and the district judge thereupon issued the oral *in camera* order which is the subject of this appeal. In a somewhat discursive ruling, he stated that plaintiffs' counsel must have access to the detailed facts about the use of informants and that the FBI must provide the eighteen files [2] for inspection by four attorneys representing the plaintiffs.[3] He stated also that production would not stop with the eighteen files but would undoubtedly

[2] The FBI has withdrawn its objection as to one of the files, because plaintiffs already know the name of the informant.

[3] One of the four attorneys is also a member of SWP.

go beyond and might encompass the full thirteen hundred informant files. The lawyers were ordered to keep the information which they secured confidential and, indeed, not to make public the disclosure procedure which the court had decided to follow.

Defendants seek review of this order under both 28 U.S.C. §§ 1651 and 1291, relying as to the latter section upon the collateral order rule of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Plaintiffs concede that this Court has jurisdiction. However, jurisdiction cannot be conferred by agreement of the parties, *Stratton* v. *St. Louis Southwestern Railway*, 282 U.S. 10, 18, 51 S.Ct. 8, 75 L.Ed. 135 (1930); *IBM Corp.* v. *United States*, 493 F. 2d 112, 119 (2d Cir. 1973), *cert. denied*, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed. 2d 774 (1974), and it is the court's duty to determine whether the order is cognizable for review. *United States* v. *Cusson*, 132 F. 2d 413, 414 (2d Cir. 1942).

In *Xerox Corp.* v. *SCM Corp.*, 534 F. 2d 1031 (2d Cir. 1976), where appellate review was sought of pretrial discovery orders of documents assertedly protected by the attorney-client privilege, this Court reiterated its longstanding position against reviewability. We stated that in the absence of a 28 U.S.C. § 1292(b) certification, a persistent disregard of the Rules of Civil Procedure or a manifest abuse of discretion, interlocutory review of pretrial discovery orders would not be permitted. We also indicated that review might be allowed where the case presents legal questions of first impression or of extraordinary significance. The district judge has not certified this matter for appeal. Unless, therefore, the application to this Court satisfies one of the alternative requirements

for reviewability, we are bound by our prior decisions to deny review.

The question of informer privilege is, of course, not one of first impression. It is an ancient doctrine with its roots in the English common law, 3 *Russell on Crimes,* at 592–93 (6th ed. 1896), founded upon the proposition that an informer may well suffer adverse effects from the disclosure of his identity. Illustrations of how physical harm may befall one who informs can be found in the reported cases. *See, e.g., In Re Quarles,* 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 1080 (1895); *United States* v. *Toombs,* 497 F. 2d 88, 90 n.1 (5th Cir. 1974); *Swanner* v. *United States,* 406 F. 2d 716 (5th Cir. 1969); *Schuster* v. *City of New York,* 5 N.Y. 2d 75, 180 N.Y. S. 2d 265, 154 N.E. 2d 534 (1958). However, the likelihood of physical reprisal is not a prerequisite to the invocation of the privilege. Often, retaliation may be expected to take more subtle forms such as economic duress, blacklisting or social ostracism. *See Usery* v. *Local 720, Laborers' International Union of North America,* 547 F. 2d 525, 527 (10th Cir.), *petition for cert. denied,* —— U.S. ——, 97 S.Ct. 2649, 53 L.Ed. 2d 255 (1977); *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.,* 459 F. 2d 303, 306 (5th Cir. 1972); *Wirtz* v. *Continental Finance & Loan Co.,* 326 F. 2d 561, 563–64 (5th Cir. 1964); *Mitchell* v. *Roma,* 265 F. 2d 633, 637 (3d Cir. 1959); *Hodgson* v. *Keeler Brass Co.,* 56 F.R.D. 126, 127–28 (W.D.Mich.1972); 8 Wigmore, *Evidence* § 2374 at 762 (McNaughton Rev. 1961). The possibility that reprisals of some sort may occur constitute nonetheless a strong deterrent to the wholehearted cooperation of the citizenry which is a requisite of effective law enforcement.

Courts have long recognized, therefore, that, to insure cooperation, the fear of reprisal must be removed and that "the most effective protection from retaliation is the anonymity of the informer." *Wirtz* v. *Continental Finance & Loan Co., supra,* 326 F. 2d at 563–64; *see also McCrary* v. *Illinois,* 386 U.S. 300, 306–09, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967); *Usery* v. *Local 720, supra,* 547 F. 2d at 527. "By withholding the identity of the informer, the government profits in that the continued value of informants placed in strategic positions is protected, and other persons are encouraged to cooperate in the administration of justice." *United States* v. *Tucker,* 380 F. 2d 206, 213 (2d Cir. 1967). Congress, also, has recognized the importance of this protective measure. *See, e.g., United States* v. *Greenwood Municipal Separate School District,* 406 F. 2d 1086, 1089–1090 (5th Cir.), *cert. denied,* 395 U.S. 907, 89 S. Ct. 1749, 23 L. Ed. 2d 220 (1969).

The doctrine of informer privilege is applied in civil cases as well as criminal. *Wirtz* v. *Continental Finance & Loan Co., supra,* 326 F. 2d at 563, and limits the right of disclosure under Rule 34 of the Federal Rules of Civil Procedure. *Wirtz* v. *Robinson & Stephens, Inc.,* 368 F. 2d 114, 116 (5th Cir. 1966). Indeed, there is ample authority for the proposition that the strength of the privilege is greater in civil litigation than in criminal. See *United States* v. *Carey,* 272 F. 2d 492, 493 (5th Cir. 1959); *Mitchell* v. *Roma, supra,* 265 F. 2d at 637–38; *Black* v. *Sheraton Corp.,* 47 F.R.D. 263, 272 (D.D.C. 1969); *Bocchicchio* v. *Curtis Publishing Co.,* 203 F. Supp. 403, 407 (E.D. Pa. 1962). However, the privilege is

not absolute in either. Where the identification of an informer or the production of his communications is essential to a fair determination of the issues in the case, the privilege cannot be invoked. *Roviaro* v. *United States,* 353 U.S. 53, 60–61, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); *United States* v. *Alexander,* 495 F. 2d 552, 553 (2d Cir. 1974).

The burden of establishing the need for disclosure is upon the person who seeks it. *United States* v. *Prueitt,* 540 F. 2d 995, 1004 (9th Cir. 1976), *cert. denied,* 429 U.S. 1063, 97 S. Ct. 790, 50 L. Ed. 2d 780 (1977). This burden is not met by mere speculation that identification might possibly be of some assistance. *United States* v. *Prueitt,* 540 F. 2d at 1003; *United States* v. *D'Amato,* 493 F. 2d 359, 366 (2d Cir.), *cert. denied,* 419 U.S. 826, 95 S. Ct. 43, 42 L. Ed. 2d 50 (1974). Disclosure should not be directed simply to permit a fishing expedition, *United States* v. *Berrios,* 501 F. 2d 1207, 1211 (2d Cir. 1974); *Waldron* v. *Cities Service Co.,* 361 F. 2d 671, 673 (2d Cir. 1966), *aff'd sub nom. First National Bank* v. *Cities Service Co.,* 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968), or to gratify the moving party's curiosity or vengeance, *Shore* v. *United States,* 60 App. D.C. 137, 141 49 F. 2d 519, 523 (1931), but only after the trial court has made a determination that plaintiff's need for the information outweighs the defendant's claim of privilege. *Kerr.* v. *United States District Court,* 426 U.S. 394, 405, 96 S. Ct. 219, 48 L. Ed. 2d 725 (1976).

District courts have the inherent power to hold *in camera* proceedings, *United States* v. *Hurse,* 453 F. 2d 128, 130–31 (8th Cir. 1971), *cert. denied,* 414 U.S. 908, 94 S. Ct. 245, 38 L. Ed. 2d 146 (1973), and this is a

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"highly appropriate and useful means of dealing with claims of governmental privilege." *Kerr* v. *United States District Court, supra,* 426 U.S. at 406, 96 S. Ct. at 2126. The district judge has made an *in camera* inspection of the eighteen files at issue but has refused to rule on their confidentiality. Instead, he has thrown them open to inspection by four attorneys representing the plaintiffs and has indicated his intention to permit similar inspection of additional files. It is the contention of the defendants that the district judge, in thus attempting to determine "whether the circumstances are appropriate for the claim of privilege", is in fact "forcing a disclosure of the very thing the privilege is designed to protect." *United States* v. *Reynolds,* 345 U.S. 1, 8, 73 S. Ct. 528, 532, 97 L. Ed. 727 (1953). Defendants assert that, if the purpose of the informer privilege rule is to encourage cooperation through the promise of anonymity, this purpose will be ill-served by a practice of delivering informants' files to opposing counsel. The district judge's ineffective direction that this procedure, which he had adopted, not be made public indicates that he was aware of the problem.

However, it is by now well-established that a district judge, in the exercise of his discretion, may permit opposing counsel to participate in and assist him in the conduct of *in camera* proceedings under a pledge of secrecy. *See, e.g., United States* v. *Nixon,* 418 U.S. 683, 715 n. 21, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); *United States* v. *Anderson,* 509 F. 2d 724, 729 (9th Cir.), *cert. denied,* 420 U.S. 910, 95 S. Ct. 831, 42 L. Ed. 2d 840 (1975). The order appealed from does not therefore create an issue of first impression or extraordinary signicance, nor was its issuance an abuse of discretion which warrants appellate review.

We would be remiss, however, if we did not express our concern that the course upon which the district judge has embarked will lead to disclosure for which there is no substantial need, *Brennan* v. *Engineered Products, Inc.,* 506 F. 2d 299, 303 (8th Cir. 1974), and to unnecessary rummaging in government files. *Taglianetti* v. *United States,* 394 U.S. 316, 317, 89 S. Ct. 1099, 22 L. Ed. 2d 302 (1969); *Donohoe* v. *Duling,* 330 F. Supp. 308, 312 (E.D. Va. 1971), *aff'd,* 465 F. 2d 196 (4th Cir. 1972). Although disclosure in small servings effectively precludes appellate review, it does not make the end result more palatable to either the defendants or the public. As has been well said, "the general disclosure of informants' identities to defense counsel is likely to compromise the fundamental public policy underlying the [informer] privilege." Levine, *The Use of In Camera Hearings in Ruling on the Informer Privilege,* 8 U. Mich. J. L. Ref. 151, 171 (1974).

Defendants argue forcibly that plaintiffs have no valid cause of action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.,* or the Constitution and rely in addition upon the two year statute of limitation contained in 28 U.S.C. § 2401(b) as a valid defense. These issues are not now before us but will be determined by the district court on the trial. However, the identification of informants, once made, will be irreversible on an appeal from the final judgment. *Metros* v. *United States District Court,* 441 F. 2d 313, 315 (10th Cir. 1971). As this Court stated when this case was before it on a prior appeal, the district court should weigh "the serious prejudice to the

Government from compromising some or all the informants for all time, even though the final determination of the action may be for the defendants." *Socialist Workers Party* v. *Attorney General,* 510 F. 2d 253, 257 (2d Cir. 1974).

We are far from convinced that plaintiffs' attorneys require a wholesale disclosure of informants' identities in order to prepare their case for trial.[4] The activities of the informants have been extensively disclosed in the discovery already had, and most of the other proof necessary to establish plaintiffs' claim is already in plaintiffs' possession. In this case, which probably will be tried without a jury, *see O'Connor* v. *United States,* 269 F. 2d 578, 585 (2d Cir. 1959), a decision as to the need for discovery of much privileged matter can be deferred safely until more fundamental issues, perhaps dispositive of the need, are decided on trial. See *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.,* 289 U.S. 689, 697, 53 S. Ct. 736, 77 L. Ed. 1449 (1933); *Usery* v. *Local 720, supra,* 547 F. 2d at 528; *Ellingson Timber Co.* v. *Great Northern Ry. Co.,* 424 F. 2d 497, 499 (9th Cir.), *cert denied,* 400 U.S. 957, 91 S. Ct. 354, 27 L. Ed. 2d 265 (1970); *United States* v. *Schine Chain Theatres,* 4 F.R.D. 108, 109 (W.D. N.Y. 1944).

In summary, although some other circuits have taken a more liberal position with regard to the re-

[4] Moreover, while we share the trial judge's confidence in the character and integrity of plaintiffs' counsel, we are less sanguine than he concerning their ability to conceal the information which is about to be disclosed to them. Indeed, unless counsel are prohibited from making use of the information thus obtained, the very thrust of their future inquiries may point interested observers directly to many of the individuals involved.

viewability of interlocutory orders of the type involved herein, *see, e.g., Usery* v. *Ritter,* 547 F. 2d 528, 532 (10th Cir. 1977); *Metros* v. *United States District Court, supra,* 441 F. 2d at 315, we are bound to follow this Court's strong policy against review. However, as in *Baker* v. *United States Steel Corp.,* 492 F. 2d 1074 (2d Cir. 1974), we are hopeful that the district judge will give full consideration to the thoughts here expressed.

Appeal dismissed and application of writ of mandamus denied.

DOOLING, District Judge.

I concur in the result.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(No. 638, Docket 74-2640)

SOCIALIST WORKERS PARTY, ET AL.,
PLAINTIFFS-APPELLEES

v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS-APPELLANTS

Argued December 24, 1974.
Decided December 24, 1974.

Before FRIENDLY, TIMBERS and GURFEIN, Circuit Judges.

PER CURIAM:

In this action, filed in the District Court for the Southern District of New York in July, 1973, the Socialist Workers Party (SWP), its youth-arm, Young Socialist Alliance (YSA), and several members sought wide ranging injunctive and monetary relief against a large number of Government officials with respect to alleged activities directed against the two organizations. Various pretrial steps had been taken, and trial early in 1975 appeared to be in prospect. On October 25, 1974, plaintiffs moved for what was styled a "preliminary" injunction restraining the Director of the Federal Bureau of Investigation (FBI) and his agents "from attending, surveilling, listening to, watching, or in any way monitoring the

fourteenth National Convention of plaintiff Young Socialist Alliance to be held at the Jefferson Hotel in St. Louis, Missouri, from December 28, 1974, through January 1, 1975, and further restraining them from threatening any of the said acts and from causing or threatening to cause any of the said acts." After receiving affidavits and hearing counsel on three occasions, Judge Griesa, on December 13, 1974, rendered an extensive oral opinion and entered an order granting the injunction sought.[1] The defendants promptly appealed and moved for a stay [2] and for a reference or an expedited appeal, claiming *inter alia* that non-attendance by the informants would compromise their usefulness and even entail risk to their safety. On December 19 we set a briefing schedule which would bring the motions on for argument on December 24. Since decision on the motion for a stay would in effect determine the appeal and the briefs appeared to include all considertions relevant thereto, we later advised counsel that we would hear the appeal itself.

A few facts are undisputed: The convention is open for attendance by any person under the age of 29. This is true even of "delegated" sessions where only elected delegates may speak and vote but all registrants are welcome as observers. Persons attending the meeting wear identification badges. There is to be no electronic surveillance. Although at one time the FBI had developed a program to engage in disruptive activities at SWP and YSA conventions, this was formally discontinued in April 1971, and there is nothing to show it has been renewed. While the district judge and the plaintiffs make some

[1] The order specifically included confidential informants.

[2] Judge Griesa had denied a stay.

general references to "surveillance", the Government has represented that at the 1974 convention there will be none in the ordinary sense and that the investigating method will be the use of informants who will attend the meetings as any member of the public, including the press, has been allowed to do. Despite some contrary allegations by the plaintiffs, there is no evidence that the FBI sends the names of persons attending the conventions outside the Federal Government; it does send them to the Civil Service Commission which has made use of them as a basis for questioning those who are Government employees or seek Government employment.

Although not disputing that at one time the SWP aimed at the overthrow of the government of the United States by force and violence, plaintiffs assert and the district court found that this policy had long since been formally abandoned. The Government contends, however, that, despite official disapproval, a minority in the SWP, called the Internationalist Tendency (IT), endorses and supports the current use of violence in line with the views of the International Majority Tendency of the Fourth International, a Trotskyist-communist organization headquartered in Europe with which SWP, although claiming not to be affiliated, concedes it has "a sympathetic, fraternal relationship." The FBI has also come upon information indicating that the IT regards as its "most important priority" an "interventionist" role in the YSA which will lead that organization to adopt the revolutionary aims of the IT.[3]

[3] Some of these details are contained in reply affidavits submitted on the motion for a stay. Plaintiffs have moved to strike these, and particularly to strike an affidavit with respect to the nature of the informants which was submitted *in camera* in line with an offer of proof made by the defendants to the district judge in an unsuccessful effort to obtain a modification of the injunction which would allow the informants to attend on condition that they not report to the FBI. These affidavits flesh out material already in the record; the need for this has arisen in part from the fact that the district judge proceeded on the basis of affidavits, rather than heeding our news that, except in cases of urgency, disputed issues of fact relevant to the issuance of temporary injunctions should not be so determined. *SEC* v. *Frank*, 388 F. 2d 486, 490–493 (2d Cir. 1968). In part the need arose from extra record references in appellee's memorandum in opposition to the motion for a stay. For example, when appellees say in opposing a stay: "There is not a shred of evidence that this policy [of disruption] has ever been repudiated or withdrawn as a key factor in FBI decisions or operations concerning plaintiffs", it was appropriate for the defendants to submit an affidavit that there is also not a "shred of evidence" that the policy has continued. Technically the affidavits are properly before us only on the motion for a stay; although the issues on this and the appeal are almost inextricable, we have considered them only in that context.

At first blush there would hardly seem to be a role less appropriate for or capable of effective performance by the federal judiciary than advance supervision of the investigative methods of the FBI on a case-by-case basis, particularly in the field of national security. Recent instances where national security has been inappropriately invoked should not obscure that, as the Supreme Court has observed, "unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered," *United States* v. *United States District Court,* 407 U.S. 297, 312, 92 S. Ct. 2125, 2134, 32 L. Ed. 2d 752 (1972), where the Court also quoted from Chief Justice Hughes' opinion in *Cox* v. *New Hampshire,* 312 U.S. 569, 574, 61 S. Ct. 762, 765, 85

L. Ed. 1049 (1941).[4] The Government distinguishes the Supreme Court decisions mainly relied on by plaintiffs, notably *NAACP* v. *Alabama,* 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958); *Bates* v. *Little Rock,* 361 U.S. 516, 523, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960); *Gibson* v. *Florida Legislative Committee,* 372 U.S. 539, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963), and *DeGregory* v. *New Hampshire,* 383 U.S. 25, 829, 86 S. Ct. 1148, 16 L. Ed. 2d 292 (1966), on the ground that these did not involve the judiciary in exercising prior restraints on an investigative agency in the executive or legislative branch but rather represented a refusal to permit legal processes to be used against individuals or associations in a manner violative of First Amendment rights. Indeed, it claims that the injunction here issued flies in the face of the holding in *Laird* v. *Tatum,* 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972), that a complaint seeking to enjoin the Army's data-gathering system with respect to lawful civilian political activity did not present a justiciable controversy. It relies particularly on the statement, 408 U.S. at 15, 92 S. Ct. at 2326:

> Carried to its logical end, this approach [of the Court of Appeals for the District of Columbia Circuit, 144 U.S. App. D.C. 72, 444 F. 2d 947, 958] would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the "power of the purse"; it is not the role of the judiciary,

[4] "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

> absent actual present or immediately threatened injury resulting from unlawful governmental action.

The district judge and the appellees say that this case comes within the qualification at the end of this wise observation of the Chief Justice. Although a number of reasons are asserted, two appear to be most important. The one principally relied on by the district judge was that plaintiffs in *Laird* v. *Tatum* had showed only a "subjective chill" whereas the plaintiffs here had submitted affidavits asserting that attendance at YSA conventions had in fact been discouraged by knowledge of FBI surveillance plans. The other is the lack of as much justification for the FBI's surveillance as was thought to exist for the Army's plan to inform itself with respect to dissident student organizations so as to be better able to cope with disorders if required to do this on short notice.

We are not greatly persuaded with respect to the validity of these or other asserted distinctions, on the facts presently before us. Save possibly for the communication of names to the Civil Service Commission, the FBI's use of the information gathered by it from attendance at the YSA conventions seems parallel to that of the Army as described in Mr. Justice Douglas' dissent in *Laird* v. *Tatum,* 408 U.S. at 24–25, 92 S. Ct. 2318. Moreover, the Court of Appeals in that case had characterized the plaintiffs' claim as being that the Army surveillance "exercises a *present inhibiting effect* on their full expression and utilization of their First Amendment rights . . .", 444 F. 2d at 954 (emphasis in original), and it is hard to see why the attendance of FBI informants at YSA conventions should have more of an inhibiting effect

than the Army's surveillance of student organizations. With respect to the second ground, the bite of the decision in *Laird* v. *Tatum* was that, absent a stronger showing of "chill" than was made by the plaintiffs there, the courts were not to go into this. If the issue is open for inquiry, while the possibilities of the dissident wing in SWP being able to gain control and effectuate its desires to convert YSA into a violent movement may be less than the risks of serious student disorders in the late 1960's, the stakes are greater. The FBI has a right, indeed a duty, to keep itself informed with respect to the possible commission of crimes; it is not obliged to wear blinders until it may be too late for prevention. As Judge Weinfeld observed in *Handschu* v. *Special Services Division*, 349 F. Supp. 766, 769 (S.D.N.Y. 1972):

> The use of informers and infiltrators by itself does not give rise to any claim of violation of constitutional rights.

Although plaintiffs apparently concede that use of informants need not await the existence of probable cause for arrest, we have not been informed either by them or by the district judge what they think the proper standard to be. Moreover, while plaintiffs' case here may be better than Tatum's in some respects, it is weaker in another. A major basis for the attack there, certainly the most significant factor for the dissenters, was that investigation had been conducted by the Army as distinguished from a civilian investigative agency.

The underlying action here raises the issue so eloquently described by Mr. Justice Jackson nearly twenty-five years ago:

> The Court's day-to-day task is to reject as false, claims in the name of civil liberty which, if granted, would paralyze or impair authority to defend existence of our society, and to reject as false, claims in the name of security which would undermine our freedoms and open the way to oppression.

American Communications Ass'n v. *Douds*, 339 U.S. 382, 445, 70 S. Ct. 674, 707, 94 L. Ed 925 (1950) (concurring and dissenting). It does this in the special context of whether the conduct sought to be protected is a legitimate area for investigation. Such an issue deserves treatment on a full record and with ample time for reflection, initially by the district judge, later by this court, and perhaps ultimately by higher authority. There was no urgency requiring the district judge to decide issues of such gravity by granting an injunction against the FBI's continuing, for one more YSA convention, the practices it had followed for many years, apparently without serious injury to the plaintiffs, and confronting us with the need of acting within a few days, in the midst of a crowded calendar, on a problem deserving weeks of consideration and opinion writing on a proper record. The plaintiffs made no showing sufficient to justify issuance of an injunction on the basis of conflicting affidavits, see note 3, and reliance on what they term "informed representations of counsel" with respect to the involved relationships of SWA, its members, and other organizations. Plans for attending the convention on December 28 must largely have been made, or not made, well before the injunction was issued on December 13. The only benefits to plaintiffs in relieving the "chill" allegedly created by the FBI were the possibility that the injunction, if sufficiently publicized, might lead some with souls less courageous than those of the indi-

vidual plaintiffs, see 408 U.S. at 7–8 n. 7, 92 S. Ct. 2318, to decide to attend after all, and to encourage greater freedom by participants in advocating the revolutionary tactics which the plaintiffs claim to abhor. Even on this the benefit is simply the incremental difference between fear of revelation by prearranged informants and of voluntary reports by others who are free to attend these public meetings; no one has yet suggested that the FBI be restrained from receiving information freely reported to it. Against this is the serious prejudice to the Government from compromising some or all the informants for all time, even though the final determination of the action may be for the defendants. Whatever may be the ultimate merits of plaintiffs' case, there was no occasion for a rush to judgment with respect to the Fourteenth YSA convention when the proof was that the FBI was proposing to do only what—indeed apparently less than—it had done without serious adverse effect before. We hold therefore that issuance of the broad injunction on this inadequate record was an abuse of discretion.

One respect in which the balance may tip in favor of the plaintiffs is the FBI's practice of transmitting to the Civil Service Commission the names of persons attending the convention. Apparently defendants concede that such attendance would not justify dismissal from or denial of employment. See *Gordon* v. *Blount*, 336 F. Supp. 1271 (D.D.C. 1971). This is the point most stressed by the plaintiffs in seeking to show "objective chill", and we think the values of preserving freedom of association justify enjoining such transmission pending final determination of the ac-

tion or earlier order of the district court or this court. We shall hold the Government to its representation that no transmission is made outside the Federal Government.

With this exception, the injunction is vacated. The various motions are thus rendered moot. The mandate will issue forthwith. No costs.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of October, one thousand nine hundred and seventy-seven.

Present: Hon. Ellsworth A. Van Graafeiland, Hon. William H. Webster, Circuit Judges; Hon. John F. Dooling, District Judge.

77–3041

In Re:

UNITED STATES OF AMERICA

A petition for a writ of mandamus having been filed and argument having been had thereon,

Upon consideration thereof, it is

Ordered, adjudged and decreed that the petition for a writ of mandamus be and it hereby is denied and the appeal dismissed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

By ARTHUR HELLER,
Deputy Clerk.

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of March, one thousand nine hundred and seventy-eight.

Present: HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge;* HON. JOHN F. DOOLING, *District Judge.*

IN RE: UNITED STATES OF AMERICA
(77–3041)

A petition for a rehearing having been filed herein by counsel for the petitioner

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO,
Clerk.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

(No. 73 Civ. 3160)

SOCIALIST WORKERS PARTY AND YOUNG SOCIALIST ALLIANCE, ET AL., PLAINTIFFS

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

Dec. 13, 1974.

OPINION OF THE COURT

GRIESA, District Judge.

This is a motion brought by plaintiffs for a preliminary injunction restraining one of the defendants, namely, the Director of the Federal Bureau of Investigation, from having his organization conduct any surveillance or monitoring of the 14th National Convention of the Young Socialist Alliance, planned to be held at the Jefferson Hotel in St. Louis, Missouri, from December 28, 1974 through January 1, 1975.

I will refer to the Young Socialist Alliance as the YSA, as we have done in the arguments.

The YSA is one of the plaintiffs in this action, which seeks broad relief against what the plaintiffs consider to be the illegal surveillance and harass-

ment carried on by the various governmental officials and agencies against the plaintiffs.

The YSA is an unincorporated association, with headquarters in New York. Its basic function is that it is the youth arm of another one of the plaintiffs, namely, the Socialist Workers Party, which I will refer to as the SWP.

Both the SWP and the YSA advocate the replacement of capitalism with socialism in the United States. Their specific doctrines will be discussed at greater length later in my opinion.

The motion for preliminary injunction is granted, for the following reasons.

Let me first summarize the salient facts.

The record indicates that the YSA convention will be open to delegates and also other young people under the age of twenty-nine, which is the cut-off age for the YSA. The convention will be open to other young people interested in learning about the YSA and the SWP. There will be workshops, panel discussions and other meetings, at which both members and other interested young people will be permitted to attend. There will apparently be official delegates to this convention which will have certain voting rights, and there will be at least one meeting where only the delegates are permitted for the purposes of voting for the YSA National Committee.

One of the principal events of the convention will be the announcement by the SWP of its candidates for president and vice president of the United States for the 1976 election. It is planned to have a rally at the Hotel Jefferson, at which this announcement is made. The public will be invited to this rally.

Although the meetings contemplated have various degrees of public or private characteristics, as I have described, basically the intention is to have only persons coming to participate in the meetings as interested observers or participants, and it would appear that if someone attempted to attend any of these meetings and was considered undesirable by the YSA or the SWP, those organizations would have the right to refuse admission to such unwanted persons.

It appears that the FBI has for many years had an investigatory interest in the SWP and the YSA, because it has considered that these organizations are Marxist revolutionary organizations, whose purpose is the illegal overthrow of the United States Government.

The FBI apparently has for many years carried on surveillance at the National Conventions and other meetings of the YSA and also of the SWP. The FBI has stated plainly in this action and has otherwise indicated that it intends, unless barred by court order, to carry out surveillance of the YSA convention coming up on December 28th. Indeed, in August or September of this year, the FBI paid a call to the offices of the Hotel Jefferson to inquire about what banquet rooms and guest rooms were being reserved for YSA convention attendance, and the FBI told the hotel management that it would carry out surveillance of the convention.

The FBI has filed affidavits stating that it intends to have confidential informants attending the convention meetings to find out the identity of persons attending and to find out the substance of the discussions held.

The FBI denies that it intends any electronic surveillance or searches or photographing.

The YSA claims that this proposed surveillance has placed or threatens to place a substantial inhibition on the ability of the YSA and its members and other persons who would be interested in attending to carry out the convention in a free and normal manner.

One of the principal reasons why it is plain that the FBI proposed surveillance will place restrictions on the convention is related to what the FBI intends to do with the information obtained from the surveillance. The record demonstrates quite clearly that the FBI, despite the abolition of the well-known Attorney General's list, still considers that the SWP and the YSA are revolutionary organizations, dedicated to the overthrow of the constitutional form of government of the United States by force and violence.

It appears that when the FBI learns of a person's affiliation with the YSA or the SWP or learns of a person's attendance at the meetings of those organizations, the FBI records such information in its files. A principal use of such information is to inform United States Government departments and agencies of such facts in the event that an SWP or YSA member or someone attending its functions seeks employment with such government department or agency.

It appears that the FBI informs the government department or agency of the connection of the person with the YSA or the SWP and states to the government department or agency that these organizations are dedicated to violent revolution in the way that I have described. This results in obvious problems to the persons seeking the government employment, including being subjected to extremely searching questioning about political beliefs.

The record does not disclose in detail what does and does not happen in the case of such employment ap-

plications, but it appears clear to me that the procedure does place a very substantial onus and burden upon the persons involved.

Returning to discussion of the upcoming convention, the record shows quite clearly that the FBI surveillance of such meetings and the FBI procedures as far as use of information is concerned are quite well known among persons who consider attending the YSA convention and that they operate as a substantial deterrent to such attendance. The record shows that persons who have been engaged in attempting to recruit attendance for the conventions have encountered instances of people who state that they would be interested in attending but are afraid to attend because of this FBI surveillance.

Beyond the specific instances which have been cited in the affidavits, it appears to me that a natural consequence under the circumstances is that the FBI surveillance would inevitably put a substantial inhibition and barrier upon the normal carrying out of these meetings and the normal ability to attract young persons to attend them.

It seems to me also clear that the fear of people with regard to attending at the meetings is not a mere mirage but it is a reasonable fear in light of what the FBI does with the information obtained by it at these meetings.

There are other facts to be discussed at a later point, but this is probably the appropriate juncture to discuss the first question of law.

The threshold question of law to be dealt with is whether there is a justiciable controversy. This is the Government's formulation of the question, and I think it is probably a satisfactory one.

The plaintiffs are relying upon a contention that their First Amendment rights of freedom of speech and freedom of association are threatened with substantial impairment. The defendants deny this contention and rely on the line of authorities which hold that if there is no actual prohibition against the exercise of First Amendment freedoms but merely a subjective, self-induced chill on the exercise of those rights and freedoms, then there is no cognizable right upon which a court can grant relief.

The principal reliance of the Government is upon the Supreme Court decision in *Laird* v. *Tatum*, 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154, a decision in 1972. The majority opinion in that case was written by Chief Justice Burger and joined in by Justices White, Blackmun, Powell and Rehnquist. Justices Douglas, Marshall, Harlan and Stewart dissented.

The case dealt with intelligence gathering activities of the United States Army which were being carried out to help meet the instances of domestic violence and terrorism which were being carried out and threatened at that period.

The plaintiffs in that action filed suit, claiming that their political rights, their First Amendment rights were being inhibited and stifled by this intelligence gathering activity of the United States Army.

The majority opinion held that there was no valid cause of action. At page 13 of the majority opinion, there is a statement of the holding that there was no indication that the plaintiffs had sustained or were immediately in danger of sustaining a direct injury as a result of the Army's actions. There was merely the amorphous claim that the very existence of the Army's data gathering system created somehow a

chilling effect on First Amendment rights. In other words, the specific claim of a specific injury which is presented in this case was not presented in *Laird* v. *Tatum*.

I do not mean to oversimplify the application of the *Laird* v. *Tatum opinion*. The questions I raised in oral argument are difficult ones. There is language at page 11 in the opinion which the Government with much force argues applies directly to our present case and prevents relief here. However, I believe that the *Laird* v. *Tatum* opinion must be applied on its facts and that the language of the majority opinion must be read in the context of those facts, and on this basis I am holding that the *Laird* v. *Tatum* opinion does not preclude relief in the present case.

Another case relied on by the Government is the Second Circuit decision in *Fifth Avenue Peace Parade* v. *Gray,* 480 F. 2d 326 (2nd Cir. 1973). To me, this case is clearly inapplicable. There, the FBI activity had an entirely different purpose from what is contemplated here. The FBI was seeking information about the numbers of demonstrators which would be converging on Washington for the Vietnam Moratorium in November 1969.

The Court of Appeals, in an opinion written by Judge Mulligan, relied specifically on that fact. He further noted that there was no attempt to make notations about identities of persons, no attempt to use or gain information for any other purpose than to insure the orderly handling of crowds in connection with this moratorium. Consequently, he held that there was no reasonable basis for finding any chill whatever upon the First Amendment rights of the plaintiffs.

It seems to me that the line of authortiy which is relevant is found in the case which have held that First Amendment rights can be violated by disclosure of membership in controversial organizations. I refer to *Gibson* v. *Florida Legislative Commission,* 372 U.S. 539, 83 S. Ct. 889, 9 L. Ed. 2d 929, and other, similar cases. These authorities hold that there is a valid First Amendment claim presented when a governmental authority seeks to obtain information about the identities of the members of organizations such as the NAACP or the Republican Party in Southern states et cetera, and that the organizatoins have standing to protect their members from unwarranted invasions by the government of rights to association and privacy.

One of the ideas used in the reasoning of these cases is that when the objective of a group is unpopular at a given time, revelation of the identities of those who have joined together may provoke reprisals from those opposed to the group.

I believe that those cases apply here, in view of the fact that one of the principal activities, if not the principal activity of the FBI in the contemplated surveillance would be to record the identities of the parties for use in the manner which I have described.

I realize that there are distinctions which can be drawn between the present case and the membership list cases. For instance, it can be argued that when people attend a public or semi-public meeting, they somehow waive the right to privacy which is protected in the membership list cases. However, on balance, I find that that distinction is not a compelling one. I do not believe that a person who attends a meeting such as the one we are talking about inevitably waives his right to have his attendance a

more or less private matter and not subject to Government surveillance. If he goes beyond this and manages to get his picture and name published in the party paper or something like that, this would be a different matter, but we are not talking about that kind of people. We are talking about the rank and file of the young people who apparently wish to attend this type of meeting with something less than that much notoriety.

Finally, we are dealing with the basic problem of inhibiting the right of association, and the record before me indicates convincingly that the presence of FBI informants at the meeting will do this. In my view, this is sufficient ground for holding that there is a justiciable controversy about the invasion of First Amendment rights.

The case most directly on point is a case decided by the then District Judge Swygert, who is now Chief Judge of the Seventh Circuit, and I have reference to *Local 309* v. *Gates,* 75 F. Supp. 620, a case decided in the Northern District of Indiana in 1948. Judge Swygert held that a union was entitled to injunctive relief against police surveillance at union meetings, that there was a strike in progress, and there had been violence in connection with the strike.

The police argued that they were entitled to monitor the meetings in order, among other reasons, to check on possible violence. Judge Swygert found as a fact that although there had been violence in the strike, there was no indication that the meetings had any relationship to violence. He further found that the inhibiting effect upon right of association was a natural result of the surveillance. He found factual indications of such inhibiting effect and granted the in-

junctive relief on the basis of First Amendment violations.

The second branch of our problem relates to the question of whether the Government has a valid reason for invading the First Amendment rights, that is, whether there is a sufficiently compelling interest or a sufficient interest of any kind on the part of the FBI which would justify it to carry out the activity with the effects which I have just described.

This brings up the question which has occupied us at great length, that is, whether indeed there is any indication that the upcoming meeting of the YSA will have any relation to violence, illegal activity of any kind.

We have had extensive proof and discussion on this point, which I will not attempt to describe in full detail now. I think it can be summarized as follows:

The YSA and the SWP are loyal to the teachings of Marx, Lenin and Trotsky. In 1938, the SWP subscribed or promulgated a declaration of principles which said, as quoted in the materials before me, that at all times the organizations would contend against the fatal illusion that the masses can accomplish their emancipation through the ballot box.

Although this does not specifically advocate violence and illegal activity, the Government urges with some reason that such is implicit in the statement. However, this is a declaration made some thirty-six years ago. The record is undisputed that the declaration was repudiated by the SWP in 1940. The Government contends that this was merely a subterfuge to avoid the application of certain legal strictures. The plaintiffs contend that the repudiation of violence or the amendment of the original declaration of principles was ut-

terly sincere, as proven by some thirty-four years at least, of a record of nonviolence.

In my view, the plaintiffs are completely right. I have asked the Government to come forward with any indication whatever of violent revolutionary activity or any other illegal activity carried out by the YSA or the SWP, and the Government has come forward with absolutely nothing.

I have asked the Government to provide any indication of any discussion of violence or illegal activity or any incitement of such activity involving any prior national convention of the YSA, this being the fourteenth such convention. The Government has come forward with nothing.

The Government's main reliance as far as any current problem or risk is concerned relates to a matter discussed at length this afternoon, which, again, I will not attempt to describe in detail. Basically, I believe, it can be summarized thus:

There have developed in the SWP throughout the world certain factions, one of which adheres to what they consider the traditional and standard SWP doctrine of nonviolence. This is admitted to be the clear majority view, at least in the United States. There is another, minority view, which apparently managed to have passed at a meeting this year, an international meeting, a resolution approving the use of guerrilla warfare in Latin America. The meeting to which I refer is called the Tenth World Congress and was held in early 1974.

The representative of the majority of the United States party was opposed to the resolution backing the use of guerrilla force in Latin America and said that in his opinion it foreshadowed a more basic

break, with more widespread geographical implications as far as the basic question of non-violence versus violence was concerned. However, the minority faction in the U.S. party, according to the representations made to me which I credit, which was in favor of the resolution about guerrilla warfare in Latin America, has been ousted from the SWP party in America as of July 1974.

There was never anything, in my view, beyond the most tenuous suggestion of a possible implication of violence in the United States.

In view of the ouster of the minority faction, I believe that tenuous suggestion has been basically eliminated.

It should be remembered that the SWP is a party with a membership of one thousand or two thousand and that in the last general election it obtained votes of about one hundred thousand.

The SWP and the YSA have come forward with materials which I find convincing regarding their current non-violent beliefs and their current disavowal of violence.

At the time of the assassination of President Kennedy, the national secretary of the SWP issued a press release condemning the assassination, condemning political terrorism and stating that political differences within our society must be settled in an orderly manner by majority decision after free and open public debate in which all points of view are heard.

The constitution of the SWP has nothing advocating violent, illegal activity. There is in the record a pamphlet written by one George Novack, entitled "Marxism versus Neo-Anarchistic Terrorism," which, despite what one may think of many of the beliefs

stated therein, is nevertheless a most eloquent and intelligent statement of reasons against what is called individual terrorist activity.

I have questioned, on the basis of that pamphlet, what ultimate form of activity is contemplated and advocated by the SWP and the YSA, and I think it can be summed up as follows:

There is, indeed, in the pamphlet I have referred to and in other pieces of literature much of the rhetoric of revolution, that is, use of the term "revolution". There is talk about action of the masses and so forth, and it is clear that the ultimate, long-range goal of the SWP would be and it is stated to be the expropriation of the financial resources of this country from their present owners and the placing of such resources in the hands of the working class.

Why is not this the advocacy of revolution which would justify FBI surveillance at the meetings of this group? I do not believe there is such justification, and I believe that the revolutionary rhetoric must be taken in context in order to avoid a departure from reality.

The talk about the expropriation of power is right now a discussion of theory. There is not the slightest indication of any mass action or any other action to now or in the near future expropriate property by this party. The party obviously realizes that its small size now would make such a program ridiculous. They have expressed this in their own words, and what they are doing right now is to have discussions of socialism. They are sponsoring and supporting causes which they believe in, such as the farm workers' activity in California, women's lib and so forth. The discussion

of ultimate action by the masses is a theoretical discussion.

I have reviewed a recent issue of their publication called The Militant, which is quite a lengthy newspaper, and it is filled with the discussion of all manner of public issues, and there is in my view not the slightest hint of any present violent threat or any such threat for the near future. The newspaper is filled with discussions of candidates supported by the SWP for various offices throughout the country, discussions of school board problems in New York City and so forth and so on.

As a matter of policy, it seems to me, finally, that the healthy thing for our society to do is to permit this group to freely have their discussions of the issues which concern them and of their theories. It seems to me inevitable that as a result of those discussions at such conventions as are coming up, the theories will evolve and that it would be absurd to place any restrictions upon their exercise of First Amendment rights because of some theoretical goal long in the future, if ever, of the consummation of their avowed socialist program.

For these reasons I find and conclude that the proposed FBI surveillance threatens a substantial impairment of the First Amendment rights of plaintiffs SWP and YSA and that the Government has shown no compelling interest and no other necessity of any other degree which would justify the impairment which I have described.

Since this is a preliminary injunction motion, the standard which I am to apply is an alternative standard, that is, a preliminary injunction is justified if the plaintiffs have shown a probability of success on

the ultimate merits and a threat of irreparable injury; or a preliminary injunction is justified if there are serious and substantial questions regarding the merits of the action, and the hardships to the plaintiffs from not granting the injunction outweigh the hardships to the defendants in granting the injunction. I think the second of the alternative tests is the appropriate one.

It surely seems to me clear that the plaintiffs have raised serious questions and substantial questions about their right to First Amendment relief. Further, it seems to me that there is a showing of substantial harm to the upcoming convention and to the participants if the injunctive relief is not granted.

Finally, it seems to me clear that the Government has shown nothing in the way of a loss to its interests if the injunction is granted.

The plaintiffs should settle an order at the earliest opportunity.

U.S. GOVERNMENT PRINTING OFFICE: 1970

No. 77-1419

In the Supreme Court of the United States

OCTOBER TERM, 1977

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

SOCIALIST WORKERS PARTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX TO THE PETITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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SUPPLEMENTAL APPENDIX TO THE PETITION

At a hearing held on April 11, 1978, District Judge Griesa—who is among the respondents in this case because we sought a writ of mandamus in the court of appeals—criticized the contents of the petition for a writ of certiorari. Judge Griesa stated that we had not accurately and fully described the reasons he gave for his actions and the status of discovery. We have attached as a supplemental appendix the transcript

of the April 11 hearing. We also attach the transcripts of the hearings of May 31, 1977, and June 22, 1977, in response to Judge Griesa's request that they be made available to the Court.[1] After the plaintiffs have filed their memorandum in response to the petition, we will address both Judge Griesa's remarks and any arguments the plaintiffs may make.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

[1] During the proceedings on April 11, Judge Griesa referred to numerous other transcripts that, in his view, bear on the issues before this Court. Some of these transcripts pertain to proceedings after the case was in the court of appeals and thus are not part of the record that would be before this Court. The other transcripts pertain to related matters but not to the disclosures at issue here, and we have elected not to file the entire record of these lengthy proceedings. See Rule 21(1) of the Rules of this Court.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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73 Civ. 3100

SOCIALIST WORKERS PARTY, ET AL., PLAINTIFFS,

—against—

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
DEFENDANTS.

April 11, 1978—10:15 a.m.
New York, N.Y.

Before:

HON. THOMAS P. GRIESA,
District Judge

APPEARANCES:

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Attorneys for Plaintiffs

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MARGARET WINTER, Esq.
MARY PIKE, Esq.

ROBERT B. FISKE, JR., Esq.
United States Attorney for the
Southern District of New York

By: THOMAS E. MOSELEY, Esq.
STUART PARKER, Esq.
FRANK WOHL, Esq.
Assistant United States Attorneys

THE COURT: Good morning.

MR. MOSELEY: Good morning, your Honor.

THE COURT: I received a copy of the certiorari petition. Although I believe I technically was a respondent in the Court of Appeals matter and perhaps I am still a respondent, I don't know what the et al. covers, but anyway I obviously took no part in the Court of Appeals proceeding and had no desire to do so. It is up to the litigants to handle review proceedings of whatever nature. I take the same view as far as the Supreme Court proceeding: it is up to the lawyers for the litigants. I would take that view unless there was some unusual reason for me to do otherwise, and I think I would have a right to do otherwise. I don't see any reason yet to take that view at all.

The only thing that I wanted to speak to you about this morning is that I think that, because of the time pressures or communications difficulties between Washington and New York, I think there are some things in the certiorari petition which I would think the Government might wish to correct. I don't have any quarrel with advocacy, and people have different views of the facts, and that is really for the litigants to sort out on different interpretations. But there are some things that I think are really unfair to the Supreme Court, and, in fairness to the judicial process, I cannot in good conscience sit back without calling some things to your attention.

On page 2 there is a section entitled "Opinions Below" and there is a statement that "The district

court did not render an opinion concerning the present issues," and then there is a reference to a prior opinion of the district court. That is the one back in 1974 about the preliminary injunction motion.

It is simply incorrect that the district court did not render an opinion concerning the present issues. I rendered an opinion, which was the subject of the proceeding in the Second Circuit. It is a bench decision, but bench decisions are rendered all the time. I assume the Government will correct that and comply with the Supreme Court rules which require the attachment of that opinion, and indeed other opinions.

MR. MOSELEY: Your Honor, if I may be heard, we would prefer to have your Honor's comments as they come now seriatim, and after that I think that we will be in a position to respond to your Honor's concerns, unless your Honor believes that the comments are—

THE COURT: No, I don't call for comments. I did not mean to indicate you were required either now or at this hearing to comment. I am really just addressing you with my comments, and it is up to you what action you take.

MR. MOSELEY: We may wish to comment at the conclusion of the proceedings.

THE COURT: All right.

The Supreme Court Rule 23(1)(i), which specifies what has to be included and appended to a petition for certiorari, states: "There shall be appended to

the petition a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including all opinions of courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, opinions in companion cases."

I think the United States Attorney's Office is well aware that the mandamus in the Court of Appeals specifically related to my bench ruling of May 31, 1977, and the Government has, of course, the transcript and my bench opinion appears at page 4 through 26.

In addition, the matter of the FBI informants was only part of an overall privilege question which was presented with regard to the FBI, the CIA, and the NSA. It would seem to me that within the spirit and intention of the Supreme Court rule, the opinions on the NSA and CIA issues are also pertinent, directly pertinent.

As you know, there was a public opinion filed, dated June 10, 1977, and a sealed opinion filed June 10, 1977, and the sealed opinion at pages 15 through 17 specifically deals with the distinctions which I found between the way the CIA and NSA matters should be handled, on the one hand, and the FBI matters, on the other hand.

The certiorari petition neither referred to nor enclosed any of those opinions.

Going back to the bench ruling about the FBI, the May 31 bench decision was briefly supplemented in the transcript of June 22, 1977, on page 11, beginning line 14, through page 14, line 18. I recall that the Government suggested that they should have additional time to file a mandamus petition, because they wished to take into account the supplementary material in my statement of June 22.

So the Government is well aware that that June 22 transcript in brief part contains an essential part of my bench ruling on the FBI question.

The certiorari petition does quote the district court, a statement which is quoted as follows: That the district court was "reasonably convinced that the identity of the individuals in all, virtually all, cases would be useless to [him] as a judge or to the parties to the litigation."

That statement is quoted in the certiorari petition.

MR. BOUDIN: On page 12, your Honor.

MR. MOSELEY: It is first quoted, your Honor, at page 4.

THE COURT. Quoted at page 4, quoted at page 12, and it may be quoted at one or more other places. It was referred to frequently.

That comes from a transcript of April 14, 1977, and the petition for certiorari fails to state that that is the transcript it comes from and that that was some six weeks or so before the actual ruling. The actual ruling, of course, is not either quoted or even attached.

The April 14 transcript might well be, in fairness to the Supreme Court in its examination of the issues, a transcript which should be attached, because it contains a summary analysis of the eighteen files which

I stated on the record and which was a prelude for the ruling that I gave on May 31. I am referring to the transcript of April 14, from pages 2 through 13, line 18, on page 13. In addition to that, it would put the statement about the names in some context.

For reasons which I think may appear in a minute, I would also suggest that the issues sought to be discussed in the certiorari petition could be discussed more accurately if reference was made to two other transcripts, namely the transcript of November 3, 1977, page 2, line 3, to page 21, line 22, and the transcript of January 27, 1978, page 2, line 3, through page 31, line 11. Obviously, it is a matter of judgment and it is not up to me, but it is difficult to understand why two opinions from 1974 are included where the ones from 1977 and early 1978, which directly bear on the points under discussion, are entirely omitted.

Also the petition failed to include the order of the Court of Appeals denying rehearing en banc, although the order of the Court of Appeals denying rehearing by the original panel was included.

There are statements at page 4 and page 13 which state that the respondents have had broad discovery by way of interrogatories, depositions and production of documents—that is page 4—and then at page 13, starting at the very bottom of page 12, it says: "The way in which these informants were used has been exhaustively canvassed in discovery that has included nine sets of interrogatories directed to the FBI, the

depositions of at least 18 federal officials, and the disclosure of more than 70,000 documents."

It may be that there were nine sets of interrogatories, depositions of 18 federal officials, and 70,000 documents produced, but the point is, as the Government very well knows, that if that is to imply or indicate to the Supreme Court that these informant files would be cumulative of other materials, the Government knows full well that that is simply not the case and has never been considered to be the case. We have gone over that before. I cannot understand how such a representation could be included in a certiorari petition.

The Government is fully aware of the transcripts. The proceedings of May 4 and 5, 1976, contain extensive discussion of the discovery with respect to FBI informants, and it was expressly agreed that the interrogatories should be used as an initial device to see what information could be obtained, and the whole question of whether the plaintiffs would move for production of some or all of the informant files was expressly agreed to be deferred.

The Government is fully aware that the answers to interrogatories were never intended to take the place of documentary evidence, although the Government reserved its right to assert the privilege claims which it has now made. No interrogatory answers, depositions, or documents produced thus far provide the information or evidence contained in the FBI informant files.

This matter was reviewed by me with the Government following the Court of Appeals decision, and the transcript is October 21, and I don't have that at the moment, I will get it, but I made a detailed review of the exact status of the discovery as to FBI informants, and it is my memory that Mr. Moseley on the record agreed basically with my summarization and made no objection to it. I think it might behoove the Government to review these transcripts in connection with the representations and indications in the certiorari petition. Moreover, entirely omitted from the certiorari petition is the procedural history of what happened following the submission of the interrogatory answers. The interrogatory answers were originally submitted in June 1976—I am talking about the first set, I believe.

MR. MOSELEY: Answers were served, your Honor, in June of 1976.

THE COURT: Right. And I think that was the first set of answers about the informants.

MR. MOSELEY: Yes.

THE COURT: There were subsequent developments. As you know, the matter of Mr. Redfern, the Denver informant, came to light in July and indicated that the answers to interrogatories about Mr. Redfern were incorrect. In August and September 1976 there was a procedure by the FBI to have all interrogatory answers checked, and I believe that for each answer the agent who had prepared the answer submitted a supplemental affidavit. I don't know how many changes were made, but there were

many changes made in the answers originally submitted.

In early August 1976, after this problem had arisen with the interrogatory answers, Mr. Boudin made his motion for production of the nineteen informant files in question in this present proceeding. Then not only was there the first set of supplemental affidavits referred to above, which was filed in August and September 1976; it is also true that on October 18, 1976, a second supplemental set of affidavits was filed regarding the nineteen informants who were the subject of Mr. Boudin's motion. These supplemental affidavits contained further emendations to the interrogatory answers for the informants who were the subject of Mr. Boudin's motion.

Thus, the Government is well aware that none of the depositions and document production thus far was intended to cover the FBI informant question. And, as to the interrogatories, which were intended to be the device by which discovery on the informant issue should start, the scope of these interrogatories was necessarily limited and serious questions about the accuracy of the answers arose.

I now have the transcript of October 21, and I refer counsel to the material beginning at page 22, Mr. Moseley's statement on page 23, line 12, where he says, "That is generally correct," in reference to my summarization of the informant discovery matter.

At page 6 of the certiorari petition there is a statement about the statute of limitations possibly being an absolute defense. Then at the very end of the cer-

tiorari petition, page 14, it says: "There is no reason why the district court should direct disclosure of informants' identities in advance of determining that the disclosure is necessary and in advance of considering legal questions that would obviate any need for discovery." I focus for the moment on the last phrase, which uses the wording "in advance of considering legal questions that would obviate any need for discovery."

That is not correct. The Government made a lengthy motion to dismiss major portions of this action, whatever it thought could be dismissed. That motion was exhaustively briefed and argued and considered by the Court, and it was denied on July 29, 1976. The transcript reflects that ruling.

At that time the district court stated—this is contained at page 66 of the transcript of July 29—that it would consider having a preliminary trial on the statute of limitations, although the Court ruled that on the record then existing there could be no dismissal of the action on that ground. The Court invited an application for a preliminary trial.

To my knowledge—and I would certainly be happy to stand corrected, because the record is very full—I know of no application at any time by the Government for a preliminary trial until the Government's letter of October 19, 1977, after all the discovery proceedings about the informants had been completed and after the Court of Appeals had rendered its decision of October 11.

MR. MOSELEY: Your Honor, I might add that the transcript of April 14—

THE COURT: I was about to cover that.

MR. MOSELEY: Yes.

THE COURT: The Government on April 14 did not apply for a preliminary trial. That is in the transcript at page 44. I stated at the bottom of that page that I would not have a partial trial, but obviously, since nobody had applied for one, it was hardly appropriate to hold one. In any event, that subject came up after almost all the work on the informant issue had been carried out. If the Government had wanted a preliminary trial, the invitation was clearly to apply for one promptly in the fall of 1976. The Government never made such application.

None of these matters are indicated in the certiorari petition, and obviously the statement at page 14 is totally incorrect.

In addition to the ruling of July 29, 1976, it should be noted, as the Government well knows, that following Judge Van Graafeiland's decision, the Second Circuit's decision, the district court reviewed at length this question of whether there was some preliminary legal issue which would dispose of the case and eliminate the need for discovery. That review was made, and the results of that review were placed on the record on November 3, 1977. This was in direct response to the comments of Judge Van Graafeiland about the possibility of the preliminary legal issues being dispositive. In that transcript I went over the existing record and explained again why I

felt that the existing record did not justify dismissal of any part of the complaint.

However, I stated that, following the production of the eighteen files which were the subject of the motion, I would consider any possible means to expedite the trial and make it more efficient, including even at some point a preliminary trial on the statute of limitations if that was appropriate.

At page 4 of the petition states that the district court has declined to determine whether the files were privileged or even whether respondents had established a strong showing of need for the names.

Incidentally, the Government is well aware that I did not order the disclosure of the "names" as such, and indeed that I denied Mr. Boudin's motion for disclosure of the names of the 1,300 informants. In connection with this case, a disclosure of "names" as such would have a different purpose from a limited production of files in the manner directed. The files disclose the types and extent of informant activities for which the plaintiffs claim the FBI is responsible. The record shows, for instance in the April 14, 1977 transcript, the repeatedly stated purpose of the district court to develop this evidence as much as possible through statistics and other summaries with a minimum of public disclosure of informants' identities. This was one basic purpose of the ruling of May 31, 1977, providing for confidential production of 18 files. In any event, if the Government is not seeking to confuse or mislead the Supreme Court, I do not understand why accurate language is not used.

Going on, at page 12, footnote 11: " . . . the district court has declined to make any ruling after in camera review concerning the claim of privilege, and the court has emphasized that it will not heed the court of appeals' request to reconsider its decision."

Then at page 14, in footnote 14, there is language about "wholesale delivery of files to counsel in advance of a finding, as a result of in camera inspection, that additional assistance was needed concerning a particular document or portion of a document."

Finally, at the very end of the petition there is the statement about the district court directing disclosure in advance of determining necessity.

I don't want to argue the merits of my determinations, but the omission of the district court opinion and the other relevant statements from the certiorari petition surely constitutes the omission of essential items bearing on the question of whether the district court did or did not consider proper factors.

Any comments?

MR. MOSELEY: Your Honor, we appreciate this opportunity, and we will of course, as soon as this transcript is typed and delivered to us, convey your Honor's comments to the Solicitor General. I don't think any further comments are really in order or appropriate at this time. I am certain that, as the case unfolds before the Supreme Court, Mr. Boudin will have arguments with respect to the petition, and the matter which is on the particular narrow issue which is raised in the Supreme Court will be fully briefed.

THE COURT: What is the particular narrow issue?

MR. MOSELEY: The narrow issue, your Honor, is really the question of appealability of an interlocutory order such as yours and whether it can be appealed on an interlocutory basis, as we had suggested under the unique circumstances of this particular case.

THE COURT: Then what is the purpose of having the material at Section 2 from pages 12 to 14? That is not talking about the narrow issue of the type of appellate review; that is talking about the actions of the district court.

MR. MOSELEY: I think that that is considered as necessary background.

THE COURT: It is just background.

MR. MOSELEY: With respect to this. That is all I have, your Honor.

MR. BOUDIN: I just wanted to say that I appreciate your Honor's observations. Obviously, I read the petition, came to a number of conclusions which will appear in my opposing memorandum, but I join with the Government in expressing appreciation, because this is a continuing case before your Honor. This is not an appeal from a final judgment. I think your Honor's observations—I hope—will be taken into consideration by the Government. If they are not, I will act accordingly. Thank you, sir.

MR. MOSELEY: I just wanted to note for the record, your Honor, that we will pass your Honor's considerations on, without necessarily agreeing or

disagreeing with them or necessarily agreeing or disagreeing with any characterization that your Honor makes.

THE COURT: Does the United States Attorney's Office have no role in the preparation of a certiorari petition?

MR. MOSELEY: Your Honor, the ultimate responsibility for that preparation rests with the Office of the Solicitor General. We have naturally been in consultation with them, but they have—

THE COURT: Did you see a draft in advance of the filing?

MR. MOSELEY: We discussed, we did consult with them, your Honor, in that connection.

THE COURT: Did you see a draft in advance of the filing?

MR. MOSELEY: We consulted with them in connection with the draft prior to the filing.

THE COURT: Did you see a draft in advance of the filing?

MR. MOSELEY: Yes, your Honor, that is what I just said.

THE COURT: Did you see this present material before it was filed

MR. MOSELEY: Yes, I did, your Honor.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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73 Civ. 3100

SOCIALIST WORKERS PARTY, ET AL., PLAINTIFFS,

—against—

ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS.

New York, N. Y.
May 31, 1977—1 p.m.

Before:

HON. THOMAS P. GRIESA,
District Judge

APPEARANCES:

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United States Attorney for the
Southern District of New York

By: WILLIAM S. BRANDT, Esq.
THOMAS MOSELEY, Esq.
STUART PARKER, Esq.
Assistant United States Attorneys

ALSO PRESENT: MR. SYD STAPLETON

THE COURT: I would like to have this hearing considered to be an in camera hearing on the same basis as the hearing of May 19, 1977, although the people here are more in number than the May 19 hearing.

We have here, in addition to Mr. Boudin, Mr. Jordan, we have Ms. Winter, and then—

MS. PIKE: Ms. Pike.

THE COURT: Who are, I take it, members of the bar of this court.

MR. BOUDIN: For purpose of this case they are members of the bar.

THE COURT: Ms. Winter, you were introduced before. Just refresh my memory. You are a member of what bar?

MS. WINTER: I am a member of the DC bar and about to be admitted to New York.

THE COURT: I admitted you to the bar of this court for purposes of this case, is that right?

MS. WINTER: That is correct.

THE COURT: Ms. Pike?

MS. PIKE: My situation is the same, your Honor, except I have not taken the New York bar, but I have been admitted for this case only.

THE COURT: And you are a member of the DC bar?

MS. PIKE: That is correct.

THE COURT: And Mr. Stapleton of the SWP is here. Then, of course, Mr. Moseley and Mr. Brandt and Mr. Parker for the Government.

The meaning of having this in camera is this, and I want this agreed to, although I certainly have the power to direct it, but I certainly want it specifically agreed to by all concerned before we proceed further. I am faced with a situation where, as I explained on May 19, I believe that we may have some conflict between publicity and getting the job done for this case. I have the same reluctance of any judge to try to place any limit on publicity, but in the present juncture that is where I stand. Therefore, I am being careful about the subject of publicity, and in order to talk somewhat more freely than I might otherwise talk, in order to prevent any misunderstandings by way of publicity, I am having a limited number of sessions in camera. That means that anything said today regarding the FBI informant question is to be limited to this room; that nobody present is to disclose the substance of our conversation here today about the FBI informant question to anybody not present, whether that means other members of the SWP or the YSA or the press or anyone else.

Is that understood, Mr. Boudin?

MR. BOUDIN: That is. My colleagues and Mr. Stapleton understand and all agree to it.

THE COURT: I am also going to touch on two other things beside the FBI issue. I am going to

announce to you what I am ruling on the CIA and the NSA issues. I intend to issue with respect to both the CIA and the NSA issues an opinion which will be public, and in addition to that, an opinion which will be sealed. The sealed opinion will go into the matters which have been furnished to me on a classified basis. For the sake of our proceedings today, I want you to know my basic ruling on all three matters-involving the CIA, the NSA and the FBI.

I will not attempt today to discuss with you anything about appellate remedies, although obviously there may be appellate remedies that you will want to consider and that you will want to ask me about.

I am sustaining the Government's objections to the contested discovery items relating to the CIA and the NSA. The Government has objected to certain interrogatories respecting the CIA and certain questions in the deposition of the CIA employee Heffner. I am sustaining the Government's objections with one or two minor exceptions which I will not try to explain. But basically the Government's objections are sustained. I am doing this on the state secret privilege ground. I do not believe that the statutory provisions cited by the Government provide any independent privilege, but I believe that the state secret privilege does apply.

I think as to the NSA there are only about two interrogatories that are in contest, but these are the interrogatories which get into the heart of what is complained about respecting the NSA. Nevertheless

I am sustaining the Government's to both those interrogatories on the ground of state secret privilege.

To all practical purposes, if my ruling is final, this does, as I am fully aware, preclude any real claim in this case about NSA activity. Certain subjects which might be the basis of a claim by plaintiffs about the CIA will not be able to be litigated because of my discovery order, although there are certain other matters involving CIA activity—operation chaos, for instance—about which the Government has voluntarily produced discovery materials.

These factors will be considered by you and ultimately will be considered by the courts in connection with any question of appellate review.

The bulk of what I wish to discuss today deals with the FBI informant issue.

I have decided to direct that the FBI make available to specific attorneys for plaintiffs the files and summaries thereof of the eighteen numbered informants about which we have had discussions. Except by specific court permission, plaintiffs' counsel will confine this information strictly to themselves without revelation to their clients or to anyone else beyond the specified lawyers.

But let me summarize briefly by reasons for directing this procedure. These reasons have already been discussed to a large extent at the in camera hearing of May 19.

I start with the proposition which has been articulated many times, which is virtually conceded, that the principal activity of the FBI vis-a-vis the Socialist

Workers Party and the Young Socialist Alliance was the use of informants. During the period beginning about 1960, up to the discontinuance of the program by the FBI in the fall of 1976, it appears that during this period of time, some 1300 informants were used by the FBI in its investigation of the SWP and YSA. That includes 300 persons who were apparently members of the SWP or the YSA.

The other approximately 1000 would apparently be people such as janitors or employees of banks or employees of schools or other people who were in a position to give information to the FBI, but they did not apparently literally infiltrate the membership of the SWP or the YSA.

It has been recognized for a long time in this case that the informant issue lies at the very heart of the plaintiffs' case as to the FBI. I would venture to say that although there are other Government agencies and officials sued in the case, the cause of action against the FBI is by far the most important phase of the plaintiffs' claims in this entire action.

From the very outset everyone has recognized that the disclosure of the evidence about the informant activity presents a most difficult problem. This has led the plaintiffs to approach the matter in a rather gingerly step-by-step process.

It has led the FBI to strongly object to the production of any information which would lead to the identification of informants who were not otherwise already identified. It has led to extremely cumbersome discovery procedures which have in-

volved the FBI and the Department of Justice in great labor and which have consumed vastly greater amounts of time than would ever be conceived of in the discovery in an ordinary case.

Three basic things have been carried out in connection with discovery on the FBI informant issue. Some time ago the plaintiffs addressed interrogatories to the Government asking for certain specific items of information about the informants. There are some 1300 sets of interrogatory answers supplied, which were gotten together by local offices of the FBI and reviewed to some extent by the Washington office of the FBI and the Department of Justice.

It is a safe to say that for a variety of reasons these answers to interrogatories, although undoubedly requiring great effort of preparation, are totally inadequate to provide the kind of evidence that any competent plaintiff's attorney would wish to have for the pursuit of this case.

The second stage occurred last summer when plaintiffs asked for the production of the FBI files relating to seven informants whose identities plaintiffs had learned. After some initial opposition, the Government consented or did not oppose the production of these files, for the reason that the identities of these persons were already known to the plaintiffs, and therefore, the confidentially simply did not exist. These files were produced to the plaintiffs last summer.

The next stage occurred with the application by the plaintiffs for the production of nineteen addi-

ional files relating to informants listed by number in the answers to interrogatories, but whose identities have not been disclosed. The plaintiffs made a selection of these 19 from the total of about 1300, believing that they would provide a sample somewhat broader and somewhat more representative than the seven informants whose files they obtained last summer. The application for the production of these nineteen additional files was made last August. It was opposed by the Government. An official of the FBI submitted an affidavit explaining the claim of privilege. This affidavit was dated October 4, 1976, This official testified in early November 1976.

The trouble with the presentation at that time was that it all dealt with the general proposition that the disclosure of informants would subject such people to retaliation by the SWP and the YSA and would create a severe psychological problem in the relationship between the FBI and informants in other investigation programs. But no one had reviewed the files in question. Consequently I felt that we were engaged in a somewhat theoretical exercise which did not permit any sensible ruling pro or con on the claim of privilege.

This led me to at first request an opportunity for an in camera review of the nineteen files. This provided me with some information, but the nineteen files were sufficiently voluminous that I realized it would be impossible for me personally or for my law clerk personally or both of us personally to really make any kind of intelligent review of the files.

Consequently, in late November 1976 I asked the FBI and the Department of Justice to provide summaries of the nineteen files answering certain listed questions. This process took far longer than I envisioned, and undoubtedly took a great deal of work, but the summaries were finished in early April.

As I understand it, the Government's objection to one of these nineteen files has been withdrawn, leaving eighteen in contest. The summaries of these files were gotten together in a most painstaking manner and, as far as I could tell, were done with scrupulous accuracy and completeness. I certainly have not checked them out in any complete sense, but on a small spotcheck basis they certainly appear complete and on their face they represent clearly a tremendous effort at completeness and accuracy.

At a hearing of April 14, 1977, I summarized the type of information which was contained in the files. I did this on the public record without disclosing any particulars which would lead to the identification of the specific informants. As the record shows, I did not attempt to make any ruling pro or con on the claim of privilege as to the informant files, these eighteen files in question.

I went ahead at that time and raised with the parties the basic and very important problem as to the handling of the overall informant evidence question in this case. The problem in this case regarding discovery and evidence is not answered by eighteen files or any small number of files. The evidence and discovery problem in this case can only be resolved when

we come to grips with the handling of the information about FBI informants on a comprehensive basis. Ultimately, that involves handling some 1300 informant files in a reasonable way.

On April 14, I made some proposals about having the Government make further extracts from the informant files which might provide evidence for the case with a minimum of identification of specific informants.

This was discussed without ruling finally on the question of the eighteen files in contest.

At the hearing of May 5, Mr. Boudin on behalf of the plaintiffs argued that, for a variety of reasons, no amount of Government summarization of the raw data would suffice. He also made application for the disclosure of the identities of all 1300 informants and indicated that in his view the files themselves would be an impractical means of handling discovery on all 1300 informants because of the immense volume, of the files and the need to conduct independent inquirie, and take depositions.

At either the April 14 or the May 5 hearing I broached the suggestion that perhaps a way to get through our many impasses on this informant issue was to have plaintiffs' counsel be able to review informant files on restricted basis without any disclosure to plaintiffs or to the public. This led to our meeting in camera on May 19. Mr. Boudin at first took the position that he would not agree to review files without being able to discuss the information with a representative of his clients.

Since the May 19 meeting I have had letters from Mr. Boudin dated May 23 and from Mr. Brandt dated May 24 announcing their final positions as to the idea of the restricted review of the FBI informant files by plaintiffs' counsel.

The Government strongly objects to production of any informant files or summaries to plaintiffs' attorneys. Mr. Boudin on behalf of the plaintiffs still takes exception to a restriction which prevents his sharing discovery information with his clients. However, Mr. Boudin's final position is that if the Court orders that the inspection of the FBI informant files be limited to plaintiffs' counsel only, without any revelation of the contents to his clients or representative thereof, he would go forward with such an inspection, and gives full assurance that the restrictions imposed by the court would by completely honored.

I propose to proceed on that basis, that is, directing the production of the eighteen files in question and the summaries thereof to plaintiffs' counsel for their use and their use only, subject to any further order of the Court that might be appropriate at a later time.

My basic reasons for doing this are the following. In the first place, there is a sharp distinction between production of these materials to plaintiffs' counsel on a restricted basis, and the public disclosure of the materials by way of ordinary discovery. This distinction is highly relevant to the objections of the FBI to production of the informant files. The two

basic objections are that such disclosure will lead to the public identification of the informants and a danger of retaliation against them by the plaintiff organization; and that public disclosure of the files, and the identification of the informants, will tend to cause informants in other Government investigations to fear loss of confidentiality, thus jeopardizing these other informant programs.

As to the risk of retaliation against the informants, there is no contention, of course, that plaintiffs' attorneys will engage in such retaliation, I do not mean to imply that plaintiffs themselves would do so. But it is clear that production to plaintiffs' lawyers, in and of itself, simply will not occasion any difficulty regarding retaliation.

With respect to the danger to other Government informant programs, the problem boils down to the theory that if other informants or potential informants learn that the SWP and YSA informants have been identified and subjected to publicity, possible harassment, etc., then the informants and potential informants in the other programs might fear the same would happen to them. However, as already stated, a restricted production of informant files to plaintiffs' counsel simply does not involve the public identification and exposure of the SWP and YSA informants. There can be no headlines in the press about revelation of names of informants or anything of this kind. Even the fact of the procedure being used—that is, production to plaintiffs' attorneys—I

intend to have treated with the maximum of confidentiality.

Thus it is my view that the restricted production of informant files to plaintiffs' counsel involves no interference—or a negligible interference—with legitimate law enforcement and other interests sought to be protected by the FBI and other Government agencies.

The Government contends that there is no sufficient showing of the need for production of the informant files, even on a restricted basis, to plaintiffs' attorneys. I reject this contention.

The files of the FBI regarding the 1300 informants used against the SWP and YSA undoubtedly constitutes the most important body of evidence in this case. They record in immense detail the activities of the informants, the instructions of the FBI, evaluations by the FBI, and so forth.

The extensive infiltration of the SWP and YSA by the FBI's member-informants, and the gathering of information from various kinds of non-member informants, raise serious questions under the federal constitution, as well as other federal and state laws and legal doctrines. There is a serious question as to whether the bulk of these FBI activities had any valid law enforcement purpose. Indeed, in the fall of 1976 the Attorney General ordered the FBI investigation of the SWP and YSA to cease.

The Government contends that discovery of the informant files is unnecessary because the voluntary cessation of the informant program precludes the

need for injunctive relief, and because there are various legal barriers to any recovery of damages, particularly under the Federal Tort Claims Act. On the latter point, I have previously denied a motion to dismiss the claims under the Federal Tort Claims Act, on the ground that the legal issues could not be properly determined without the development of a factual record. I adhere to that ruling. There are indications from the few files thus far examined that there may be a variety of tortious acts which were committed by the FBI, including trespass and conversion of property. The latter refers to removal of private documents for production to the FBI. The FBI and certain informants may have engaged in activities designed to intentionally destroy certain chapters of the SWP and YSA. The evidence about the FBI informants may reveal other activities giving rise to valid claims for damages.

I am not attempting to indicate any view on the ultimate merits of any claim. I am only stating that there are questions which are sufficiently serious to merit thorough exploration of the evidence.

I have reached certain conclusions about the discovery procedure to be used. To a great extent these conclusions are based upon my analysis of the summaries of the 19 informants files now requested by plaintiffs, plus information about the 7 files voluntarily produced last summer. I conclude that there is no legitimate reason for the wholesale public disclosure, in the manner of normal discovery, with respect to all the FBI informant files or the identities

of all the informants. I am convinced that, with careful analysis and preparation, much of the necessary information about the informant activities can be presented at the trial of this action without identifying specific informants. I discussed this to some extent at the hearing of April 14. However, this preparation and analysis cannot possibly be done without the participation of plaintiffs attorneys. Neither the Government nor the Court should be relied upon to develop plaintiffs' case.

It may well be that the files of certain selected informants, and the indentities of these informants, should be publicly disclosed in normal discovery proceedings, and that the evidence about these specific informants should be presented at the trial. There are a variety of reasons why this may be necessary and appropriate. However, the question of whether, and to what extent, this should be done, cannot be decided intelligently without the participation of plaintiffs' attorneys.

Plaintiffs' counsel must have access to the detailed facts about the use of informants. They have to date been denied access to any such detailed information, except with respect to the seven files produced last summer relating to people whose identity in some way had already been disclosed to them. But these seven files are simply inadquate by a very long way, from providing plaintiffs' counsel with proper information about the activities of the 300 member informants as a whole, to say nothing of the other 1000 or so informants who were not members.

The procedure of summarizing, having the FBI or the Department of Justice summarize files, constitutes a deprivation of the plaintiffs' lawyers from anything resembling their normal right to develop their own evidence.

If we go along on some basis where we are relying on summarization by the FBI and the Department of Justice, we are multiplying the burden on the Government enormously and multiplying the time required for any development of the issues by a tremendous degree. In other words, a new process simply has to be instituted. Both the burden and the opportunity of viewing the basic evidence should be and must be in the hands of plaintiffs' lawyers. That is the only way the litigation can proceed from here on out in any sensible fashion.

Let me outline the procedure I have in mind specifically. I want to say at this point that I am starting with the eighteen files, but I want it clearly understood that I envision that the production will not stop with the eighteen files and undoubtedly will go beyond these files. The information contained in the eighteen files is sufficiently valuable and of sufficient importance to indicate that there is valuable and important information, or there should be valuable and important information in various other of the remaining 300-odd files of member informants, and indeed another thousand files for nonmember informants. I intend at the present time to start with the eighteen, and I think this will permit an intelligent discussion by all concerned as to the issue of whether

any of those specific files should be revealed in public discovery, whether there should be depositions taken of the informants, and how to handle in some intelligent, sensible way the information contained in the large number of other files.

I come now to the question of the precise persons who will have access to the files. I have no question about Mr. Boudin and Mr. Jordan, and I am well acquainted with them through the history of this case, and I state flatly that I have no doubt whatever that they will faithfully obey the orders of this Court with respect to confidentiality.

Mr. Boudin has written me in his letter of May 23 expressing his difficulty in having the production limited to two lawyers only, and he has mentioned his need for having the other two lawyers on the case work also. I assume that you are referring to Ms. Pike and Ms. Winter?

MR. BOUDIN: Precisely.

THE COURT: He has stated that Ms. Winter, however, is a member of the Socialist Workers Party. I will come to that in just a minute.

Ms. Pike, I take it you are not a member of any of the plaintiff organization?

MS. PIKE: That is corerct.

MR. BOUDIN: May I just interrupt. We are, four of us, members of the bar. Your Honor does know me and Mr. Jordan. Your Honor has had both other counsel before you on a number of sessions. They are both members of the bar of the District of Columbia, and they have been admitted for purposes of

this case, and I vouch for their reliability. I cannot have a distinction made among counsel who are associated with me in a case and have the Court place a certain value of reliability upon one counsel as against the other. I am the principal counsel, and I am responsible for this case, and I really think that I may have been unwise in indicating a reference to membership by one of my co-counsel in the Socialist Workers Party. So far as we are here, we are here only as lawyers.

THE COURT: I have no problem as far as Ms. Pike. I think that I have observed Ms. Winter, she has appeared before me, and also in fact I think I know her a little better than Ms. Pike. From what I can see, I have the greatest respect. I don't think this is really a matter of personal respect anyway. I don't think that is anything that should enter into it, except if there was a lawyer who I did not have confidence in, I would not engage in this activity.

I must tell you that our problem here is largely with respect to possible publicity, and I am concerned with several things on the question of publicity and just let me mention them.

As to the FBI's fear for other informant programs, we are dealing, as I said before, in a somewhat speculative area. We are dealing with the subject of risk. What risk is run over what length of time by publicity about disclosure by informants? What amount of accuracy or inaccuracy or exaggeration can occur in the press? We all know that that is inherent with the best will in the world. There are things that get

exaggerated or misunderstood, etc. Then for the people who will read this publicity, if it ever occurs, and who might be in the position of the informant or potential informant that the FBI is talking about, the effect of publicity on them, again it is speculative but the risk, it seems to me, is there, and I want to be concerned about it, that you might have people who are sufficiently frightened for one reason or another that the scales are tipped by publicity. That is what I am concerned about.

Now, as to the possibility of leakage resulting from the procedure I contemplate, I really am not concerned about the actual disclosure of informants identities. I just think that whether it is Ms. Winter or any of you or any other group of attorneys, if the order is that you are not to disclose information or names to the press, that just won't be don't period.

MR. BOUDIN: Right.

THE COURT: Let us come to another consideration. With respect to this procedure, the fact that the materials are being disclosed to you as counsel, it is desirable that we go about this procedure in the greatest confidence obtainable. I am going to enter as much of an order as I can to insure that. But I am not under any illusion that there is no chance that the fact of the procedure may become known to the press or be inferred by the press.

And, I am willing to run that risk, frankly, and I think it is very little risk compared with the value of this case of getting the job done. Certainly, under the Roviero case I think the Court has discretion to

run some minimal risk. It is much less of a problem if the press picks up the fact that counsel were given the identities on a confidential basis than if the press could print names of informants.

But I want to consider whether there is some problem if you have a member of the SWP and an attorney.

MR. BOUDIN: Let me address myself to that, because that is where your Honor is wrong. I thought about it, obviously, I thought about it before I wrote my letter. What your Honor is going to do here is to direct in camera that counsel—just called counsel—can have access to these records. We are not going to publicize or give notice to anyone even that counsel has been given this, nor I assume will the Government give notice even that counsel—

THE COURT: You understand that, Mr. Stapleton?

MR. STAPLETON: Yes.

MR. BOUDIN: The question of which counsel associated with me can look at documents is a question completely within my office. It is not a matter of publicity. We don't announce who is going to look at it. It is simply that I as counsel for the plaintiffs will decide which the lawyers in my office—it happens to be one of these four—will be doing the work on the matter.

You mentioned a dual aspect. There is nothing dual about this, your Honor. Everybody has his own political affiliations, or almost everybody has, of one kind or another. And I don't regard that as creating

a dual loyalty. In this case, no matter what I may be elsewhere, I am only counsel for the plaintiffs and a member of the bar. My own political views and associations are completely irrelevant, and there is no dual responsibility.

THE COURT: In other words, you would vouch for Ms. Winter that insofar as the requirements of this case, insofar as obeying the orders of the Court, you would vouch for her that her prime loyalty in what we are talking about is to obey the Court's orders.

MR. BOUDIN: The only loyalty in this case is to Court and the case and to your Honor. There is no loyalty on her part to any organization as she acts as counsel here, any more than there is any loyalty on the part of other attorneys here who may have other associations. And I suspect that I have probably been charged with many more associations, mostly untrue, in the course of my lifetime. When I act as counsel, I act only as counsel and an officer of the Court. And I vouch that that will occur here.

MR. BRANDT: Your Honor, if I might just add—

THE COURT: Let me finish, I think you understand my problem, Ms. Winter. What I would like to know from you, and I am sure will be utterly frank with me, is there any problem at all, as far as you are concerned, with maintaining 100 percent all directions about confidentiality that I impose here? Is there any problem as far as you are concerned in

maintaining that, obeying that, even though you are a member of the Socialist Workers Party?

MS. WINTER: Your Honor, I have no problem with that whatsoever.

MR. BRANDT: Your Honor, may I just voice the Government's objection to the addition of the attorneys, in addition to our objection to the proceeding.

THE COURT: I thought you had voiced your objection in a letter.

MR. BRANDT: I just wanted to make it clear, being that we are discussing this particular matter of additional attorneys being given the identity of the FBI's eighteen informants. I just wanted the objection clearly stated for the record.

THE COURT: I think I understand you have objected entirely to this procedure, and I will assume that the record will reflect that. I will direct that the materials that I have referred to be made available to Mr. Boudin, Mr. Jordan, Ms. Pike and Ms. Winter. The order specifically covers now the eighteen files in question and the summaries thereof. Further applications may be made for further relief. I don't think we have to cover that now. As far as any files beyond the eighteen. I would want that subject to a further application.

I am specifically directing, and I will enter no further order, that the information contained in these files and in the summaries is to be given to absolutely no one beyond the four lawyers unless specifically permitted by the Court. The importance of this procedure is obviously known to the four lawyers and it is

known to Mr. Stapleton, who I think is the chief liaison with the lawyers for the plaintiff organizations. I specifically invited him today to be here, and I specifically authorized Mr. Boudin to keep him fully informed of our proceedings last time. I am directing that neither Mr. Stapleton nor the plaintiffs' lawyers make any statement whatever to the press about the procedure which we are using.

MR. BOUDIN: Nor the Government, of course.

THE COURT: Certainly the Government.

MR. BOUDIN: There is no advantage, I assure you.

THE COURT: Let us talk about the spirit of what we are doing. In this business of relations with the press, a lot of things can happen. The press can ask questions that put people in an awkward position, etc. The press may get wind of the public CIA and YSA rulings. They may ask—What about the FBI? And I really cannot sit here and enter a full set of orders which will be an absolute guarantee that the procedure will be never inferred or know to the press. I won't even try that.

So I want to ask you this, Mr. Boudin and Mr. Stapleton. Is it practical for Mr. Stapleton to be the only one in the plaintiff organizations who knows about our procedure.

MR. BOUDIN: I believe it is.

THE COURT: All right. Then I would ask and direct that that be done. Let us go to the spirit. The spirit of the thing is that we can work here and work in confidentially without publicity. So I would

suggest that if a question from the press arises, I am not putting words in anybody's mouth, but it seems to me a fair and accurate statement would be: the matter is still being handled in camera.

MR. BOUDIN: Exactly what I was about to suggest.

THE COURT: All right. That is as far as we will go.

MR. BOUDIN: We will say that if asked. If not asked, we couldn't say anything.

THE COURT: That concludes all I have to say.

MR. BRANDT: I take it that your Honor is entering his order as of the moment?

THE COURT: Yes.

MR. BRANDT: I would respectfully request a stay for two weeks.

THE COURT: For how long?

MR. BRANDT: For two weeks, your Honor.

THE COURT: I would be perfectly agreeable to granting a stay, but not for two weeks. It seems to me that you have known about this problem for some time. I would under no circumstances consider certification for appeal on this matter, that is, the FBI informant matter. I thought about it, and I believe it just does not warrant it. If the Government intends to seek an appellate remedy, then I assume it would be by way of mandamus. That is something the Government has every right to attempt.

I do think, Mr. Brandt, that I would expect that the Government could within a week decide what it

wants to do. And I realize that so much time has gone by, I don't mean to quibble with you, but I will try to save the week, if I can. I will grant a stay of this order until the end of the day June 7, 1977. That is Tuesday. That is exactly one week.

MR. BRANDT: We would appreciate the additional couple of days to resolve the matter, if that is what your Honor has decided, that a week you believe is sufficient, then that be it.

I would just like to say that we may come forward during the week with other applications to your Honor. And I would just like to keep that possibility open also, and just put your Honor on notice of that.

THE COURT: All right. I think this is all.

MR. BOUDIN: Can I just address myself to the first issue? I think your Honor has stated very clearly the effect that your Honor's CIA and NSA ruling would have on us. Bearing in mind your Honor's past observations, can I take it that we can I take it that we can expect here a certification of the issue?

THE COURT: I have to tell you that I have not really decided that.

MR. MOSELEY: Mr. Boudin would have the opportunity, your Honor, if a written decision were done, to move—

MR. BOUDIN: The opinion can also reflect it.

MR. MOSELEY: The Government, of course, would like to be heard if Mr. Boudin is going to make a formal application on the certification.

MR. BOUDIN: I can make a formal application, or I think so.

THE COURT: I think that when I get these rulings out we can have a conference without a lot of papers. I think we can decide it one way or another. I won't try to lay down anything now. I think I would like just a hearing, hear your viewpoint, hear the Government's viewpoint, and decide whether I would certify it under 1292(b) or not. I think we will leave it at that point. Thank you very much.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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73 Civ. 3160

SOCIALIST WORKERS PARTY, ET AL., PLAINTIFFS,

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS.

June 22, 1977
9:15 a.m.

Before:

HON. THOMAS P. GRIESA,
District Judge

APPEARANCES:

RABINOWITZ, BOUDIN & STANDARD, Esqs.
Attorneys for plaintiffs,

By: LEONARD B. BOUDIN, Esq.,
MARGARET WINTER, Esq.,
Of Counsel

ROBERT B. FISKE, JR., Esq.
United States Attorney for the
Southern District of New York,

By: WILLIAM BRANDT, Esq.,
STUART PARKER, Esq.,
THOMAS MOSELEY, Esq.,
Assistant U. S. Attorneys

(The following pages are sealed by order of the court).

THE COURT: I just want to get a brief report from first of all the government about any intention as far as appellate proceedings, so why don't you announce that.

MR. BRANDT: Your Honor, the government has, after several conversations, decided that it will file a petition for a writ of mandamus with the Court of Appeals.

THE COURT: When are you going to file it?

MR. BRANDT: We would like to file those papers on July 11, 1977. And if I can just briefly state my reasons for requesting that period of time. I have been handling the Socialist Workers Party case for the last approximately 15, 16 months. I will be leaving the United States Attorney's office on July 1st.

As a result, your Honor, that puts certain pressures on the other attorneys who are going to be working on the case.

Additionally, we have the July 4th weekend during that period, and I think that perhaps a day off for some of the people who have been working on the case would be appropriate.

So all we are asking for is July 11th. The total amount of time since we have access to the transcript, is only about five weeks between the time—

THE COURT: When did—

MR. BRANDT: Your Honor's order was theoretically entered on June 9th.

THE COURT: When was our hearing?

MR. BRANDT: May 31st.

THE COURT: May 31st was the hearing when I dictated?

MR. BRANDT: Yes, your Honor.

THE COURT: When did you get the transcript?

MR. BRANDT: June 7th, your Honor.

THE COURT: We are now at June 22nd.

MR. BRANDT: So we have really moved this along really quickly. We have taken two weeks to get the decision from the Solicitor General of the United States concerning our authority to file a petition, and we are really only asking for I guess a brief extension beyond that, another two and a half weeks, to file our brief.

THE COURT: The problem I have as far as timing is this, that what I was hoping could occur is that the plaintiff's attorneys could start very quickly in the review of these documents and that we could—assuming there was no order overturning my direction and we could just go along a normal course, I would have hoped that the review of the 18 or 19 files could take place really very quickly.

There are the summaries available, that can go fast. And then even the review of whatever other files would be reviewed by the plaintiff's attorneys could go forward during July and certainly—in a general way I was hoping to have this whole process over with this summer. I think we simply have to get this case to trial and I was hoping to have a fall

trial. All of that depends on getting the discovery over with this summer.

We really are, I think, basically finished with discovery, except for this matter of the FBI business. I am excluding for now the NSA and CIA for the moment. But there is a big job still to be done, however, the FBI materials are to be handled, whether it's the way I envision or some other way, a way directed by the Court of Appeals. But it's got to get over with. Summer is a very good time to get this spade work done.

So I don't want to lose any more of the summer than I can help. I know that the proceedings before me took a long time, because that was largely because the government came in with a claim of privilege without even looking at the documents and it took some time to get an analysis of the document, which I did regard and still regard as much more important than any other so-called factual submission given to me.

Consequently, the July 11th date, which puts it practically in the middle of July before you even file your mandamus, is, it seems to me, a little long. You have known of my ruling since the 31st of May. I grant that I edited the text of my remarks and you didn't have it until the 7th, but I do think that it just should not be all that cumbersome. I think the Court of Appeals handles mandamuses quickly and I think the parties should be prepared to handle them quickly.

What I will do is grant the government a stay of my order with regard to the FBI informants, I

will grant the government a stay pending the decision of the Court of Appeals in regard to their mandamus petition, providing that the mandamus petition is filed on or before the end of the day July 1, 1977. That's longer than I would like to give. I would much prefer to have the petition filed by the end of this week, I can see that that's probably impossible for you, you have been in Washington and I'm sure it's probably just impossible. But I see no reason that that mandamus petition cannot get filed by a week from this Friday. That will give us some possibility of having some progress this summer, even in view of the appellante proceedings.

MR. BRANDT: Your Honor, if I could brief just myself to your comments. Everybody I think is interested in expedition, the government is interested in expedition, plaintiff's counsel I believe is interested in expedition. In the ordinary mandamus situation there are certain outside pressures, a jury may be out, a case may be going to trial, there may be indeed Speedy Trial Act—

THE COURT: I have had plenty of mandamus petitions filed against me and they are usually not when juries are out.

MR. BRANDT: That's an extraordinary circumstance, your Honor. This is not just a procedural question. We think it goes beyond. This goes to the merits of certain of the plaintiff's claims.

As a result, your Honor, the type of briefing we believe this need to give the Court of Appeals what

we believe is the government's position, is rather extensive.

THE COURT: I adhere to my ruling. You have known of my ruling since May 31st.

MR. BRANDT: That's correct, your Honor. And we started—

THE COURT: The July 1st date—I'm not going to argue about it. If you want a further stay or different conditions, you will have to go to another court. I also wanted, and I know this is probably—it's difficult to handle all of this this morning, but I would like to see if we can make any progress on the question of whether Mr. Boudin is going to request any appellate review either by way of mandamus or by way of a 1292B request in regard to my CIA and NSA rulings.

MR. BOUDIN: May I respond to your Honor?

THE COURT: Yes.

MR. BOUDIN: I'd like to give your Honor a definite answer on Monday or Tuesday, but I think I can tell your Honor what my thought is now. It is one which will not delay any of the proceedings. In fact, my decision, such as it is, is based upon the fact that I am concerned if I do go to the Court of Appeals, asking your Honor to certify the issues.

I may find myself in a bog in the Court of Appeals and in the United States Supreme Court which would prevent the trial from occurring not only in the fall, but very frankly in January of 1978.

For those reasons our present inclination is the following, and I think we will hold to it. First, we

will not ask your Honor to certify the CIA matter. We will simply go to trial on whatever we have in this case against the CIA and are going to lack the benefit of the material which we sought to get, which your Honor made a ruling against us on. It will mean we will, I think, get some relief, we will have some evidence, it will not be what we had hoped, but that's part of life. It's only because it's so serious a decision that I want your Honor to give us until Monday or Tuesday for an answer.

THE COURT: No problem.

MR. BOUDIN: With respect to the NSA, our thought is this: I believe we have no evidence against the NSA in this case, or so unimportant that it would not be worth going to trial on, in the absence of a favorable ruling by your Honor.

Our inclination is to recognize this and have your Honor enter a judgment of dismissal of our suit against the NSA, thereby permitting us to take an appeal, assuming there will be a severance, to take an appeal on the NSA part without in any way delaying the trial against the CIA and the FBI and other agencies.

That seems to us, we have thought about it a great deal, to be the best way to preserve whatever we can against CIA and NSA and avoid any delay at all of the trial.

THE COURT: Why don't you consider that?

MR. BOUDIN: And we will advise you.

THE COURT: I won't attempt to discuss it with you until you have decided on your position.

MR. BOUDIN: Good.

THE COURT: Let me ask you this: This is getting a little out of my bailiwick, the government undoubtedly will pursue its intention of seeking mandamus on the FBI. Just for my contingent planning in the administration of the case, I assume that you would have the right in response to that to—well, I won't assume anything.

Do you consider that you have the right in response to that to challenge the aspects of that that are unfavorable to you? After all, there is a great deal of what you wanted that I denied, and my relief to you was of a very limited nature.

MR. BOUDIN: I would think so. Whether we would want to do that is another question.

THE COURT: That's really up to you.

MR. BOUDIN: Yes.

THE COURT: In other words, it could be that the result would be the Court of Appeals might open it up more than it is now opened up.

MR. BOUDIN: Could be, yes. It could be that it will be facilitated if we ask your Honor to certify that issue, the issue of the identity.

THE COURT: I wouldn't get into that.

MR. BRANDT: Your Honor, can I be just briefly heard on the matter that we discussed—

THE COURT: More on the schedule? I really cannot.

MR. BRANDT: Just looking at the schedule, your Honor, Friday is the 1st, and if we could just have sometime to the middle of next week—

THE COURT: The 1st is a week from this Friday.

MR. BRANDT: I understand that, your Honor, but the 2nd, 3rd and 4th are holidays. Nothing is going to happen between then—

THE COURT: I didn't want to inflict the cruel punishment of allowing you until the 5th, because that would be a nice way of rubbing—I like you fellows, and—

MR. BOUDIN: Your Honor actually advised us what the decision was going to be, on May 19th. It was on May 31st that it was repeated formally. But the government has now had a lot of time and gotten a lot of assistance—

THE COURT: That will stick. Let's not keep rehashing whether it's the 1st or after the 4th.

MR. BRANDT: It just seems to me that it would be in the government's best interest to have the additional time, and while we appreciate your concern for our vacation schedule, if you could just give us to sometime in the middle of the week that begins on July 3rd, that would be of help.

MR. BOUDIN: The government is always inching day after day.

THE COURT: No. Let's stick to that. If we are going to break that down, it will just be into next week and then farther into July, et cetera. I'd like to simply say one further thing about the FBI matter which I don't think I articulated, and I think it's quite important.

One of the things that is displayed in the 19 files which I have reviewed in camera and I have had summarized, one of the things which comes forth there is material dealing with the so-called international tendency, I think is the word for it. We all recall that at the time of the preliminary injunction motion in late 1974 the government claimed as a justification for infiltrating the upcoming convention that there was reason to suspect violent activity or planning of violent activity on the part of the Socialist Workers Party and to keep surveillance about such matters, for the following reason:

The claim was that the Fourth International had passed a resolution in 1969 at its world congress approving terrorism or violent revolution in Latin America, that the majority of the Fourth International had approved this motion. It was recognized that the United States party, that is, the Socialist Workers Party, had voted against that resolution and argued against it, but the government went on to contend that there were elements even within the Socialist Workers Party which espoused a revolution or favored violence or terrorism in Latin America.

This get rather complicated because of procedural problems in the Socialist Workers Party and the Fourth International, but the idea was that a minority within the Socialist Workers Party appeared to favor the pro violence resolution of the Fourth International.

If I recall correctly, the Court of Appeals relied on this to a substantial extent, relied on this argu-

ment of the government in reversing the injunction which I had entered. It was quite apparent that this was an area which required factual exploration in connection with the trial of this action.

This is not an area which is easy to deal with. It is not an area which is easy to get the relevant facts concerning. But the informant files are an important source of facts about that matter. And I discussed that in a general way at the April hearing when I was summarizing in a general way what was shown in the informant files.

I simply want to expand on that now by saying that certain of the 19 informant files contain reporting about meetings of this minority group within the Socialist Workers Party, which is called the Internationalist Tendency, I believe, that was organized by people who thought they favored the pro violence revolution. These informant files, therefore, in my view, contain important information on this issue which the Court of Appeals felt was important and which is important; that is, the extent of the influence of the pro violence group in the United States party, if any; what was discussed, what was done, what did the FBI know about the extent of pro violence, were there any plans of violent activity affecting the United States or any other country by this group or any other group in the Socialist Workers Party, or was it simply a discussion of other matters?

I say the latter, because from my review of these files it appears that although there was this thing called the Internationalist Tendency and although

there was the resolution by the Fourth International we talk about, I have read the material about the observations of discussions within the Internationalist Tendency; I have yet to read anything in these informant files indicating any planning of actual violence or discussions of actual violence among Socialist Workers groups in the United States.

I'm not saying that to make a finding of fact; there may be other information. All I am trying to indicate is that these without question constitute an important source of information about the extent of any discussions of violence or a lack of discussions of violence by this particular segment of the SWP. It contains an important source of information as to what the FBI knew about the actual facts about this Internationlist Tendency.

I want to add this as one important reason why these files are an absolutely indispensible source of evidence in this case and at the very least in my continuing view they should be furnished to plaintiff's counsel for this and other reasons. That terminates our conference.

MR. BRANDT: Your Honor, if I just may add one comment. One of the reasons the government was delayed in getting this showing was between May 31st and June 7th our notes didn't reflect some of the discussions of May 31st in the June 7th transcript.

I just would like to say that I find that the addition of additional findings by the court at this late date to be the type of thing that causes us to delay in terms of filing our brief.

THE COURT: I am perfectly aware that I edited my remarks. I know that. I am taking that into account in allowing you until July 1st. I think in the discussion I had with you on the phone yesterday I was inclined to give you only until the end of this week.

MR. BRANDT: That's correct, your Honor.

THE COURT: I wanted to have this hearing because I don't believe in having rulings like that over the phone, although we have dealt with this to some extent. But I wanted to have a full dress hearing and lay it out. I am giving you until July 1st in consideration of all the things we talked about.

This record will be sealed.

(Time noted: 9:45 a.m.)

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No. 77-1419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

v.

SOCIALIST WORKERS PARTY, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

Contrary to petitioners' statement (Pet. 2), the district court rendered a bench opinion on the present issue on May 31, 1977, and a supplemental bench opinion on June 22, 1977 (Supp. App. 16a-54a).[1] The district court also rendered bench opinions on closely related jurisdictional questions on July 29, 1976 and November 3, 1977 (Resp. App. 3a, 58a).

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[1] References herein to "Supp. App. ——" are to pages in the Supplemental Appendix filed by petitioners. References to "Pet. ——" are to pages in the petition. References to "Resp. App. ——" are to pages in the separately bound appendix which respondents are filing with the Court simultaneously with this Brief in Opposition. The respondents' appendix contains relevant portions of transcripts of proceedings before the district court.

Questions Presented

The question set forth in the petition is not before the Court. See *infra*, pp. 8-9. The questions actually presented here are the following:

1. Whether the court of appeals acted within its discretion in denying the government's petition for a writ of mandamus to vacate a district court order directing the FBI to make limited pretrial disclosure of relevant documents solely to respondents' counsel, under a protective order, where the court of appeals found that the order was within the power of the district court, involved no abuse of discretion, and raised no issues of first impression or of extraordinary legal significance?

2. Whether the court of appeals was correct in concluding that the pretrial discovery order was not directly appealable pursuant to 28 U.S.C. § 1291?

Statement

Respondents contend that for decades the FBI employed informers to spy upon, disrupt and commit criminal and tortious acts against the Socialist Workers Party (SWP) and the Young Socialist Alliance (YSA), knowing that those organizations were engaged only in peaceful and legal activities. The complaint alleges that the FBI employed informers (i) to prevent the members of the organizations from obtaining employment, housing and licenses, to harm their reputations and to disrupt their personal lives; and (ii) to attempt to control the political activities of the organizations, disrupt their electoral activities, and create discord within the organizations, thereby interfering with the members' rights to free association,

speech and lawful political activity.[2] Respondents' allegations have been borne out by discovery in this case,[3] as well as by congressional committee hearings and reports,[4] although the full extent and scope of the FBI's use of informers against respondents remain to be established for the purposes of determining damages and formulating injunctive relief.

At issue is the disclosure under protective order to respondents' counsel alone of the files of 18 FBI informers. The district court, after reviewing these files *in camera*, concluded that the informers had "provided the FBI with a consistent recital" of the respondents' "peaceful, lawful, political activities, peaceful, lawful, personal activities and a total absence of any criminal activities or plans of any nature whatever," raising "a very serious question about whether there could be any justification for this exceedingly close surveillance after this kind of record had been developed for a period of a number of years; that is, the surveillance with absolutely no indication of violent or criminal activity" by respondents (Resp. App. 122a). The

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[2] Second Amended Complaint, paragraphs 26, 27, 30, 32, 41, 73, 73A, 73B, 74, 76, 87. Court of Appeals Joint Appendix, p. 456a.

[3] See the comments of the district court on this point (Resp. App. 129a-130a; Supp. App. 29a).

[4] See *Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities*, United States Senate, 94th Cong. 2d Sess. (1976), Book II, page 8 (Church Committee), and the suppressed *Investigative Report of the Select Committee on Intelligence*, United States House of Representatives, 94th Cong., 1st Sess. (1975), made public by *The Village Voice*, Feb. 16, 1976. Both the Senate and the House committees concluded that the FBI's investigations of respondents served no legitimate law enforcement purpose. Those committees' reports and the discovery in this lawsuit were undoubtedly the chief factors in the Attorney General's decision on September 9, 1976 to order the FBI to terminate its investigations of the SWP and the YSA.

district court recognized that the FBI's use of informers against the respondents is the central issue in the case, and that discovery on this issue has been inadequate to a fair adjudication of respondents' claims (Resp. App. 47a-57a; Supp. App. 21a-32a).

The focus of discovery on the informer issue has been upon the scope and character of the informers' activities. The identities of informers, *per se*, has never been the principal issue in dispute,[5] contrary to the government's assertion (Pet. 3).

Discovery on informer activities was attempted in the first instance through interrogatories propounded to the FBI in January, 1974. The interrogatory answers initially supplied by the FBI in June, 1976 proved to be incorrect and incomplete, and showed more than one deliberate falsification. Further "supplementary" answers, supplied after these significant inaccuracies in the original answers were discovered by respondents, also proved to be inaccurate (Resp. App. 99a-100a, 115a-118a; Supp. App. 8a, 9a).[6]

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[5] The petitioners' reliance on the district court's statement that the "identity of the individuals in all, virtually all, cases would be useless" misinterprets the court's meaning, as the court itself subsequently pointed out (Supp. App. 12a). The district court has repeatedly stated that the *contents* of the informer files are essential to a fair trial of the central issue in the case, not because they reveal informers' identities, but rather because they reveal informer activities, and that the other methods of discovery on that issue have proved to be totally inadequate (Resp. App. 50a-57a, 90a-91a, 121a-125a, 149a; Supp. App. 21a-32a).

[6] The interrogatories, which had been broadly formulated to elicit at least some generalized information about the use of informers, were never contemplated by the parties or the court as more than a preliminary stage in discovery on the informer issue (Resp. App. 47a-52a).

The files of seven informers whose identities independently had become known to the respondents[7] were produced in the summer and fall of 1976. These seven files supplied neither a representative nor a comprehensive picture of the activities of the 1300 informers in question (Resp. App. 51a-52a).

Therefore, on August 5, 1976, respondents applied for an order directing the FBI to produce the files of 19 informers, selected by respondents from among the 1300 informers identified only by code number in the FBI's answers to interrogatories. Respondents selected the 19 with a view toward obtaining a representative sample of informers who played either important or typical roles with respect to the SWP and YSA.

The FBI made a blanket claim of privilege as to the informer files without reference to the particular documents ostensibly covered by the claim, by affidavit of the FBI official in charge of investigations. The government did not submit a formal claim of privilege by the Attorney General—or even by the FBI director—and it does not appear that the Attorney General or the FBI director ever reviewed the materials underlying the claim of privilege.

The district judge made an *in camera* review of the 19 files, relying in part on summaries prepared by the FBI at his request because the files, 25 drawers of material, were so voluminous. He concluded, after his review, that the informer files "undoubtedly constitute the most important

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[7] The first of these files was produced when a routine burglary arrest of one Timothy Redfearn by local police authorities in Denver led to the public identification of Redfearn as an FBI informer posing as a member of the YSA. His file, which was ordered disclosed over FBI objections, revealed that he had burglarized the offices of the SWP and YSA and the homes of their members for the FBI; it also exposed the falsity of interrogatory answers which related to him (Resp. App. 51a).

body of evidence in this case" (Supp. App. 28a), but that it was his duty as trial judge to minimize public disclosure. To this end, he determined that he required the assistance of respondents' counsel in selecting the smallest possible number of files to be disclosed publicly in order to try respondents' claims (Resp. App. 83a-84a). He thereupon ordered the disclosure of 18 files[3] to respondents' counsel, under strict protective order, on May 31, 1977. He concluded that the restricted production to respondents' counsel "involves no interference—or a negligible interference—with legitimate law enforcement and other interests sought to be protected by the FBI and other Government agencies" (Supp. App. 28a; and see Resp. App. 173a-175a). The government appealed this order and sought mandamus on July 1, 1977.

On October 11, 1977, the court of appeals denied the government's petition for mandamus and for review under 28 U.S.C. § 1291. The court of appeals enumerated the standards for interlocutory review of a pretrial discovery order, analyzed the case in light of those standards, and found that it met none of them. The court of appeals concluded that "it is by now well-established that a district judge, in the exercise of his discretion, may permit opposing counsel to participate in and assist him in the conduct of *in camera* proceedings under a pledge of secrecy" (Pet. 8A), and specifically held that the district judge had not abused that discretion in the present case. *Ibid.*

Contrary to the government's statement (Pet. 6), the court of appeals did not find that respondents "may well have no valid cause of action." On the contrary, the court noted that, although the government had "forcibly" advanced that argument, "these issues are not before us but will be determined by the District Court on the trial" (Pet. 9A).

[3] The government agreed to produce the nineteenth file, stating that the informer's identity had become known.

On November 16, 1977, the government submitted a petition for rehearing to the court of appeals with a suggestion for rehearing *en banc*. Both were denied on March 9, 1978; no active judge in the circuit voted for rehearing (Resp. App. 1a-2a).

Subsequent to the court of appeals' decision, the district judge made a second *in camera* review of the 18 files. In order to avoid further appeals and trial delays, he indicated a willingness to modify his order by making public nine of the files which seemed to him most significant. He explained his selection of the nine by detailing the tortious and criminal acts of the informers revealed in certain of these files, and as to others indicated that the information contained in them tended to refute the government's defense to the complaint (Resp. App. 85a-125a).

Contrary to the government's assertion, the district judge did not say that he was "prepared to rule that nine of the files were protected by the privilege" (Pet. 7). Indeed, he adhered to his earlier decision that the confidential production of all the files would be valuable to preparation and to litigation of the case, and said that he was proposing an alternative method simply in the hope of expediting the trial (Resp. App. 86a-91a).

Although the FBI had argued unsuccessfully before the court of appeals precisely for such a file-by-file ruling, it declined the proposal, and the district court adhered to its original decision (Resp. App. 163a-166a).

When the Assistant United States Attorney stated that the FBI ultimately might refuse to comply with any order to produce files, whether publicly or under protective order

to counsel, and might "accept sanctions"[9] for its refusal, the district judge commented that he would consider contempt proceedings against defiant officials, adding "but I can't deal with that in advance. I will face it when and if it comes . . . [W]e may not even have to reach that, and I hope we don't" (Resp. App. 129a, 132a). When the FBI again suggested the possibility of defying even a Supreme Court order to produce, the district judge again said the question was premature (Resp. App. 166a). He never suggested that the Attorney General might be cited for contempt; on the contrary, he stated explicitly: "I think that the matter, as far as contempt, would necessarily be a matter involving some person or persons at the FBI" (Resp. App. 168a).

Reasons for Denying the Writ

This case does not present the issue asserted in the petition of a potential citation of the Attorney General for contempt (Pet. 10). There is no pending or impending contempt proceeding against anyone. The only relevant order of the district court, and the only order which was the subject of the government's application for mandamus in the court of appeals, directed the Federal Bureau of Investigation, not the Attorney General, to make a limited, non-public disclosure of relevant documents to respondents' counsel alone, so that all counsel could assist the Court, *in camera,* in determining what documents should be produced for use at trial. It is premature and speculative to consider the possibility of contempt by anyone since the FBI merely indicated a possible action by it and the district court expressly stated that it had no occasion to rule upon this threat and trusted that it would not materialize (Resp. App. 168a).

[9] Contrary to petitioners' statement (Pet. 7), the government did not offer to allow "every material fact respondents sought to acquire through discovery to be deemed admitted."

The sole questions actually raised by this case concern the circumstances under which interlocutory discovery orders may be reviewed by appeal or mandamus prior to final judgment. The Court already has issued definitive and controlling guidelines on these questions which were adhered to scrupulously by the court of appeals. Further review by certiorari would be duplicative and unnecessary, and indeed would undermine the very principle of finality which Congress and the Court consistently have sought to secure.

1. The final judgment rule, established by 28 U.S.C. § 1291, prohibits, with certain exceptions not relevant here, direct appeal of a district court's interlocutory order, of which the discovery order in this case indisputably is a prime example.[10] The requirement of finality as a condition of review "is an historic characteristic of federal appellate procedure" and "has been departed from only when observance of it would practically defeat the right to review at all." *Cobbledick* v. *United States,* 309 U.S. 323, 324-325. In recent years, the Court has reaffirmed the principles so clearly set forth in *Cobbledick. United States* v. *Ryan,* 402 U.S. 530, 532-533; *Kerr* v. *United States District Court,* 426 U.S. 394, 402-403. No reason has been advanced to re-evaluate that principle here.

2. Petitioners' reliance upon *United States* v. *Nixon,* 418 U.S. 683, as authority for their claim of appellate jurisdiction ignores the unique doctrinal and practical consider-

[10] See, *e.g., Borden Co.* v. *Sylk,* 410 F.2d 843, 845 (3d Cir. 1969); *American Express Warehousing, Ltd.* v. *Transamerica Ins. Co.,* 380 F.2d 277, 280, 284 (2d Cir. 1967).

ations upon which the Court relied in that case. The President is the Chief of State and the embodiment of the nation's sovereignty. He not only is the head of the Executive Branch, he "is the Executive Department," *Mississippi* v. *Johnson*, 4 Wall. 475, 500; *Cf.*, *Myers* v. *United States*, 272 U.S. 52, 123.

For these reasons, as the Court recognized, not only would it have been "unseemly" to require the President to refuse to comply with a court order in order to obtain appellate review, but it also would have raised the novel question of whether a President can be cited for contempt at all.[11] The protracted litigation that would have been engendered would have defeated the very purpose of the final judgment rule. Even more important, it would have raised the distinct possibility that there could be no final appealable order other than the order to produce the tapes which already was at issue. Under the circumstances, which indeed were *sui generis*, the Court held that the order to produce the presidential recordings was a final order within the meaning of Section 1291.[12]

Petitioners' effort to extend the rationale of the *Nixon* holding to permit an interlocutory appeal in the present case (Pet. 10) is frivolous.[13] In the first instance, as already noted, no order has been directed against the Attorney General. Second, if there were such an order, neither cabinet officers nor sub-cabinet officials are embodied with the attributes of sovereignty associated with the Presidency, and since the earliest days of the Republic have not been accorded the judicial deference due the President. See *Marbury* v. *Madison*, 1 Cranch 137, 165; *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524, 610. To extend the *Nixon* case holding to permit government officers other than the President to seek appellate review of interlocutory orders directed against them would constitute abandonment of the final judgment rule. The government or its officers is a party to hundreds, if not thousands, of civil cases every year; indeed, it is by far the most active litigant in the federal courts. By its decision in *Nixon*—a case unique in the constitutional history of the Republic—the Court certainly did not intend to open the gates to interlocutory appeals by the government whenever a district court orders a government officer to do something he does not wish to do.[14]

The final judgment rule, of course, does not absolutely preclude appellate consideration of interlocutory orders. In truly extraordinary situations the government or any other litigant may seek relief by means of a writ of mandamus or prohibition. But, as we show next, the court of

[11] This was the precise point made in this Court by the Special Prosecutor in conceding appealability in *United States* v. *Nixon* (Supplemental Brief for the United States on Appellate Jurisdiction, p. 8).

[12] See also *Nixon* v. *Sirica*, 487 F.2d 700, 706-7 and n. 21 (D.C. Cir. 1973).

[13] Petitioners add no force to their argument by reproducing a passage from the *Nixon* opinion and substituting in brackets the words "the Attorney General" for "a President" in the quotation (Pet. 10). Such a conclusory exercise merely emphasizes petitioners' failure to analyze or apply properly the doctrine of the *Nixon* case.

[14] General recognition of the unique status of the President in contrast to *all* other officials of the Executive branch appointed by him appears in President Nixon's brief in the court of appeals in *Nixon* v. *Sirica*, *supra*, distinguishing the President from the Secretary of State (p. 13), and in Solicitor General Bork's memorandum distinguishing the President from the Vice-President. *In re Proceedings of the Grand Jury Impaneled December 5, 1972*, Application of Spiro T. Agnew, Vice-President of the United States, D. Ct. Md. 73-965, Memorandum for the United States Concerning the Vice-President's Claim of Constitutional Immunity, *passim*. See also *Sawyer* v. *Dollar*, 190 F.2d 623 (D.C. Cir. 1951), *vacated as moot*, 344 U.S. 806, holding cabinet officers in contempt.

appeals was eminently correct in holding that mandamus was neither necessary nor appropriate in the present case.

3. Only two years ago the Court analyzed the circumstances under which mandamus is appropriate, and once again provided clear and precise guidelines to be followed by the appellate courts in considering applications for issuance of the writ. *Kerr* v. *United States District Court*, 426 U.S. 394. The court of appeals' decision in this case strictly followed the standards reaffirmed in *Kerr*. Petitioners have advanced no cogent reason for the Court to reconsider its long line of decisions on the subject.

The point this Court emphasized in *Kerr*, as well as in its earlier mandamus decisions, is that the "remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." 426 U.S. at 402. See also *Ex Parte Fahey*, 332 U.S. 258, 260; *Will* v. *United States*, 389 U.S. 90, 95. It is not to be used merely to correct an erroneous ruling by the district court. *Parr* v. *United States*, 351 U.S. 513, 520; *Schlagenhauf* v. *Holder*, 379 U.S. 104, 112. Rather

> . . . the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" . . . And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes "jurisdiction," . . . the fact still remains that only "exceptional circumstances amounting to a judicial 'usurpation of power' will justify invocation of this extraordinary remedy."

Kerr, 426 U.S. at 402 (citations omitted).

Elsewhere, the Court has defined the "special circumstances" constituting a "usurpation of power" as limited

to (1) action "so palpably improper" as to place it beyond the scope of the authority conferred on the district courts by the Federal Rules of Civil Procedure, *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 256, (2) "an abdication of the judicial function," *id.*; or (3) a "clear abuse of discretion." *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383. In addition, the Court has suggested that mandamus might be available to review important legal questions of first impression. *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110.

The test applied by the court of appeals in this case (Pet. 4A) precisely followed the guidelines established by the Court:

> . . . [I]n the absence of a § 1292(b) certification, a persistent disregard of the Rules of Civil Procedure or a manifest abuse of discretion, interlocutory review of pretrial discovery orders [is] not permitted. . . . [R]eview [also] might be allowed where the case presents legal questions of first impression or of extraordinary significance.

The court of appeals found that the tests for issuing mandamus were not met in the instant case. First, it noted, the "question of informer privilege is, of course, not of first impression" (Pet. 5A). Prior decisions of this Court and of the lower federal courts made clear that the privilege is not absolute and require the district court to engage in a delicate balancing process: "[W]here the disclosure of an informer's identity, or of the contents of his communication . . . is essential to a fair determination of a cause, the privilege must give way." *Roviaro* v. *United States*, 353 U.S. 53, 60-61. See also *United States* v. *Fernandez*, 506 F.2d 1200, 1202 (2d Cir. 1974); *Westinghouse Electric Corp.* v. *City of Burlington*, 351 F.2d 762, 767, 768 (D.C. Cir. 1965). The trial court has jurisdiction and dis-

cretion to order disclosure or to uphold the privilege given "the particular circumstances of each case." *Roviaro, supra,* 353 U.S. at 62.[15]

Consequently, as the court of appeals noted, the district court did not usurp power or abuse its discretion in undertaking to determine whether and to what degree the asserted privilege should be upheld, first by reviewing the informer files *in camera,* and subsequently by ordering their limited disclosure to respondents' counsel under a protective order. Indeed, procedures for the determination of claims of privilege similar or identical to that followed by the district court have been upheld or suggested by this Court and by the Court of Appeals for the District of Columbia Circuit. *Cf., United States* v. *Nixon,* 418 U.S. 683, 715 n.21; *Kerr* v. *United States District Court, supra; Black* v. *Sheraton Corp. of America,* 564 F.2d 531 (D.C. Cir. 1977).[16]

[15] The FBI Manual specifically directs agents to "condition" informers to the fact that they may be called upon to testify about the information provided. *FBI Manual of Instructions,* §107, p. 8. And see Resp. App. 95a, 96a, 100a, 112a, 114a, 118a, 120a-121a.

[16] The district court below anticipated by several months the procedure suggested by the D.C. Circuit in the *Black* case:

> . . . [T]he district court [should] have accepted the proffered file for *in camera* inspection. At that time the government could have supplied an index correlating indexed items with particular claims of privilege. At that time the government could also have supplied an analysis containing descriptions specific enough to identify the basis of the particular claim or claims. The plaintiff would have been permitted to see this analysis and take issue with its conclusions, but the court would make the final determination after an *in camera* examination of the documents. If this procedure proved unworkable, plaintiff's counsel might have been permitted limited access to the raw file. But until an attempt was made to resolve the issue in a less intrusive way, we think that [public] disclosure [of the file] should not have been ordered.

564 F.2d 531, 545 (D.C. Cir. 1977).

If anything, the district court in this case was even more cautious and protective of the government. Unlike the district court in *Black,* the district court here examined both the files and the summaries describing the activities that were relevant to the litigation. It then made 18 files available only when convinced of the respondents' need for them, that they were relevant to the litigation, and that the court could not responsibly rule on the claims of privilege without the participation of all counsel.

Petitioners concede that mandamus ordinarily is not an appropriate remedy to review a pretrial discovery order (Pet. 8), but urge a general exception for claims of privilege on the asserted ground that such claims "cannot be evaluated under ordinary rules of procedure" (Pet. 9). Petitioners' argument is contrary to recent decisions of this Court which have applied the usual mandamus standards to privilege claims and have declined to order mandamus absent a clear showing that the district court usurped power or abused its discretion. *Kerr* v. *United States District Court, supra; Will* v. *United States, supra;* see also *City of Los Angeles* v. *Williams,* 438 F.2d 522, 523 (9th Cir. 1971).[17] Adherence to this practice is essential to maintain the integrity of the final judgment rule.

4. In denying mandamus here, the court of appeals held that the district court not only had power to adopt the procedures followed, but also that it *in fact* did not abuse its discretion by the way in which it exercised those powers, *i.e.,* by ordering limited disclosure to counsel in light of its finding of the relevance and compelling need for the files.[18]

[17] Petitioners' citation of *Maness* v. *Meyers,* 419 U.S. 449, is inexplicable. *Maness* was an appeal from a final judgment of contempt. It upheld the right of counsel to advise his client to continue to assert his Fifth Amendment privilege to the point of securing a contempt order, so that the issue could be reviewed on appeal. No departure from the ordinary final judgment rule was sanctioned or suggested.

[18] This distinguishes the court of appeals' decision from the rulings in *Usery* v. *Ritter,* 547 F.2d 528 (10th Cir. 1977), and *United States* v. *Hemphill,* 369 F.2d 539 (4th Cir. 1966), upon which petitioners seek to rely (Pet. 9). In each of the latter two cases the court of appeals found that the district court had abused

The court of appeals' view is entitled to great deference by this Court, and ordinarily should not be disturbed. *Kerr* v. *United States District Court, supra,* 426 U.S. at 402; *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 25; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 260.

In any event, the soundness of the court of appeals' judgment is apparent from a brief review of the proceedings in the district court (which were not set forth fully and accurately by petitioners). The district court acted with commendable patience and after long deliberation. The limited disclosure order came after four years of thorough pretrial proceedings and on the eve of trial. It was issued only after a remarkably careful *in camera* review by the district court of the 18 files and of detailed summaries prepared by the government, a process which occupied the court for many months.

Second, the district court ordered disclosure only after specifically finding that the information contained in the files was the best evidence available in support of the respondents' allegations and was essential to a fair deter-

its discretion *in fact* by ordering public disclosure of informers' identities where concededly there was no necessity for such disclosure. *Hemphill,* 369 F.2d at 542; *Usery,* 577 F.2d at 531. See also *Metros* v. *United States District Court,* 441 F.2d 313, 317 (10th Cir. 1970). Both the *Usery* and *Hemphill* courts recognized, however, that the informer privilege is not absolute and requires the district court to engage in a balancing process to determine whether or not disclosure is warranted. Both courts applied the mandamus standards established by this Court and applied by the court of appeals in this case, and both recognized that mandamus ordinarily is not available to review discovery orders, including claims of informer privilege, unless there has been a manifest usurpation of power or abuse of discretion by the district court: "Of course, if the order is within the range of the discretion vested in the District Judge, it is not reviewable on a petition for a writ of mandamus." *Hemphill,* 369 F.2d at 544 n. 7; see also *Usery,* 547 F.2d at 532.

Thus, petitioners' suggestion (Pet. 9) that there exists a conflict in circuits which the Court should resolve is completely inaccurate.

mination of respondents' claims for damages and for injunctive relief. (Resp. App. 50a-57a, 91a-94a, 121a-123a). The court further found that the files contained information far more relevant and complete than had been revealed through the previous discovery in the case, and, indeed, that they showed that the FBI had not been honest in some of its previous answers to interrogatories (Resp. App. 99a-100a; Supp. App. 8a, 9a).

Third, the district court proceeded with extreme caution. Only 18 of the 1300 informer files were ordered disclosed, and then only to respondents' counsel, under a protective order, so that all counsel could assist the court in isolating the relevant and material information to be introduced at trial.[19] The district court stated that such assistance was necessary if it were to limit disclosure without depriving respondents of discovery material essential to their case (Supp. App. 29a-32a).

The district court's findings on these questions were made with the thorough understanding and knowledge of the facts and the lengthy record which only a trial court can have. These findings were entitled to the deference they were given by the court of appeals. No reason exists for this Court to further review such matters.

5. Petitioners are incorrect in suggesting that the district court failed to consider "legal questions that would obviate any need for discovery" (Pet. 14).[20] In fact, the

[19] Petitioners have misread the court of appeals' concern about "wholesale disclosure" (Pet. 6), which referred to a potential discovery beyond the 18 files.

[20] The present case, of course, does not seek damages for the use of informers, *per se,* but rather for specific tortious and unconstitutional actions taken by the informers against respondents. Thus the cases cited in the petition (Pet. 13, n. 13) upholding the use of informers for mere information-gathering purposes in the

district court denied the government's motion to dismiss respondents' Federal Tort Claims Act causes of action because of unresolved questions of fact which were inseparable from the jurisdictional issues, including the statute of limitations issue raised by the government (Resp. App. 3a-6a, 9a-21a). After the court of appeals' decision, the district court *sua sponte* undertook to determine once more whether there were grounds for dismissing the Federal Tort Claims Act claims (Resp. App. 58a). It found that its "renewed labor over this topic had really reinforced [its] view that there is no justification in dismissing" those claims on the present record (Resp. App. 59a), and outlined in detail its reasoning (Resp. App. 60a-83a). The court concluded that the informer files themselves indicate potential causes of action under the Federal Tort Claims Act, and include materials relevant to the statute of limitations question

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course of *bona fide* criminal investigations have no relevance to the causes of action asserted by respondents in this case.

Petitioners' reference to the earlier opinion of the court of appeals in this case, which vacated an order entered by the district court in late 1974 enjoining the mere presence of informers at a public convention of YSA (510 F.2d 253), is particularly inapposite to the present issues. First, as just noted, respondents presently seek relief against unlawful activities undertaken by informers, not their mere presence. Second, the circumstances upon which the opinion of the court of appeals was based have fundamentally changed.

On September 9, 1976 the Attorney General ordered the FBI to terminate the investigations of the SWP and YSA. The FBI director in turn ordered that informers be instructed that they were no longer to report to the FBI on the SWP and YSA. Thus, there is no longer even a colorable claim of a legitimate ongoing criminal investigation of the respondents. Furthermore, there have been four years of discovery since the earlier opinion of the court of appeals was rendered, the district court has developed a full and lengthy record, and the parties are on the eve of trial. Thus, the two grounds cited in the opinion for vacating the order of the district court—the necessity for protecting an ongoing investigation and the prematurity of such an order in the early stages of discovery—no longer obtain.

and the other jurisdictional issues raised by the government. The court also found that the informer files would be necessary to adjudication of respondents' claims not only for damages but also for injunctive relief (Resp. App. 91a-96a; Supp. App. 51a-53a). The government quite properly has not sought appellate review of these interlocutory rulings of the district court, and the issues are not before the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 1978.

No. 77-1419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

GRIFFIN B. BELL,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

v.

SOCIALIST WORKERS PARTY, ET AL.,

Respondents.

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

APPENDIX A

Order of March 9, 1978, of the
United States Court of Appeals
for the Second Circuit

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of March, one thousand nine hundred and seventy-eight.

----------X

In re:

UNITED STATES OF AMERICA 77-3041

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner, and no active judge or judge who was a member of panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Chief Judge
IRVING R. KAUFMAN

APPENDIX B

Proceedings before the District Court of July 29, 1976

* * *

THE COURT:

* * *

I have worked further on the objections made by the Government, the legal objections to the Federal Tort Claims Act, and I think this -- I don't want to cut anybody short, but I think that it would be most improper for me at this juncture of the case to dismiss the claims as now stated by the plaintiffs against the Government under the Federal Tort Claims Act on any of the grounds referred to.

What I have in mind, according to the considerations I have given this and the papers which have been furnished to me, it seems to me that a great deal of progress has been made, an immence amount of progress has been made, in crystallizing

and defining the exact nature of the claims against the Government under the Federal Tort Claims Act on any of the grounds referred to.

I think we are all grateful we have gone through this process.

But for me to take those claims and dismiss them or strike them on any of the legal grounds briefed by the Government, I think that would be inappropriate.

As far as the question of whether the administrative claim was duly filed within two years after the accural or discovery of the claims, I think it is abundantly clear that that question raises factual issues on which there is nothing conclusive in the record as yet. I don't take the original complaint as conclusive. It is a factor, but this is a factual question, and the record has to be developed fully enough to reach a resolution.

As to the other points made by the Government, whether the particular type of claim is valid under the law of the place within the meaning of the Federal Tort Claims Act or whether it comes within or does not come within one of the express exclusions, again it seems to me the record is far from developed enough to decide that.

The nature of the claims, the facts to be proved, all of that has to be developed much more specifically than it is at this stage.

We have a general nature of a claim; for instance the disruption program. What is in fact going to be proved or not proved by the plaintiffs with respect to the disruption program? What kinds of acts are proved? At that point it will be possible to reach some kind of decision as to whether that is a valid claim under the law of the place as defined in the Federal Tort Claims Act, or whether it is or is not a kind of claim that

is excluded by the express exclusions.

Maybe some elements of the plaintiff's claims will be valid; maybe some elements won't.

I think both with respect to the statute of limitations issue and the other issues which have been briefed, I see no way under which the validity or non-validity of these claims can be definitively decided at this point.

In theory these are threshold questions, but in fact in this case I daresay they will probably not be able to be decided until after a full trial.

I don't think that's really going to hurt the case in terms of efficiency, because the Federal Tort Claims Act causes of action are only part of a very broad action which involves a lot of other claims, and so I make that statement now because I think that I have gone through these papers that have been submitted to me and tried to reach a resolution of these issues.

I think that counsel ought to know my views so that they can plan what they need to do and they are not under the impression that some big chunks of the case are going to be thrown out. I don't see how it is possible to do any such thing.

I know that we had originally said there would be no argument today on those issues, but that possibly meant that we would get together at some time next week or, indeed, at a later point, and have the argument or further argument on those issues.

In view of all the things we have got to worry about and all the things we have to do, I'm not sure anything is to be gained by gathering for another session and having further argument on those issues.

We had extensive argument before. The argument was very effective and very helpful on both sides, and a lot was accomplished in the narrow-

ing of the claims.

I don't think, really, that any amount of argument is going to convince me that any of these claims should be stricken as now stated.

The administrative claim that was filed in 1975 was on behalf of what plaintiff?

MR. BOUDIN: Two organizations, the SWP and YSA.

THE COURT: What I'm doing now is not writing a formal decision. If I were to dismiss or strike claims I would obviously write something much more formal or dictate something much more formal, but I think from a practical standpoint this is really all that's necessary.

If the Government feels that something more needs to be done at this juncture on this subject, speak up, but what I am really trying to do is make sure that we spend our energies along profitable lines.

MR. BRANDT: Your Honor, if I may speak up on behalf of the Government, we believe there are several very, very practical reasons why your Honor should decide the issues that are presented on the statute of limitations.

The first one, your Honor, is the fundamental question of your Honor's ability to grant damages under the Federal Tort Claims Act, and that's all we are talking about; it goes to the jurisdiction of this Court to even hear the case in the first place.

THE COURT: I have a right to hear enough to determine my jurisdiction and, of course, that goes to whether you call it jurisdiction or statute of limitations.

You know the case that just came down decided by Judge Smith. The Court of Appeals remanded the case because it was felt that a factual issue was raised as to the accrual of

the cause of action.

I feel that factual issues are raised here on the subject of the accrual of the cause of actions that are asserted by the YSA and SWP in respect to the disruption program and the use of informers to manipulate. I think that's the second. Those are two of the three claims asserted as now defined by those two entities.

Then we have the claim about the break-ins, and that, of course, is something that again I think there are questions of fact about the 92 or so break-ins, when that accrued or when that was discovered by the plaintiffs or should have been discovered.

Obviously if there were not questions of fact and if it was all that simple, I would be delighted to resolve it. But I am convinced there are questions of fact which are not resolved on the present record as to the accrual time or the

discovery time -- however you want to phrase it -- of each of those claims.

MR. BRANDT: Three things:

First of all, we distinguish the Camire case and the situation. In that case we think there was a different fact question involved there.

THE COURT: Of course there was. I know that.

MR. BRANDT: In that case the plaintiff didn't know the nature of the injury and what caused it, and I think, your Honor, in this particular case -- I don't mean to get to the merits, but to respond to your question I think I have to -- the government believes that plaintiffs knew how they were injured and knew who it was who was injuring them. That's what distinguishes --

THE COURT: Have you taken depositions on this subject?

MR. BRANDT: We have, and we have information annexed to Mr. Mosley's affidavit concerning

this and Mr. Siffert's affidavit. We do have information concerning this, your Honor, and we believe, your Honor, that as far as this issue goes, it's a very, very limited evidentiary issue, and if we want to have that hearing, we don't think that that hearing would take more than a couple of hours. This issue will be resolved. It will greatly simplify the issues at trial.

THE COURT: I am perfectly willing, if it is practical, to have a separate preliminary trial on the statute of limitations. I know there may be some problems about that. There are some jury questions that have been raised. I am certainly willing to consider having a preliminary trial on the statute of limitations.

All I am saying is that for the sake of what you do between now and September, I don't want to leave this hanging. I am prepared to state that on the present record I believe that the issues are not resolved sufficiently for me

to strike any of the claims.

If a further record is developed, if it's appropriate to have a preliminary trial and further develop the record in that way, then I would be happy to consider having such a preliminary trial.

If it is a short one, all the better, but all I am saying is right on the present record I don't think it's resolved.

MR. BRANDT: If your Honor could carefully study the affidavits, and I know some of them were not given to your Honor until late last night, concerning some of the information that's in the depositions, some of the information that has been supplied by the plaintiffs and in documents produced concerning this very issue, I think your Honor that the record may be sufficiently developed, and it seems to me that in addition to factual questions that your Honor believes are

open, I think that some of the factual questions are matters really of law concerning what the effect of the allegations in a complaint are.

THE COURT: I just disagree with that. I'm prepared to say that right now.

I don't think there is anything in the original complaint which as a matter of law, in and of itself, prevents the assertion by the SWP or the YSA of a claim about an FBI disruption program, the use of informants for manipulative purposes or the 92 burglaries.

I have studied that original complaint very carefully and, of course, there are some very general provisions and some very specific provisions, but, if anything, I think my reading of the complaint is that it is basically a complaint about an improper surveillance through informants and otherwise, an improper gathering of information, and an improper use of the information gathered.

I don't think that there is anything that could immediately be interpreted as referring to the kind of things that went on in the disruption program, the unique features of that program, or the unique features of this alleged use of informants to manipulate.

As far as the burglaries, there are some specific burglaries referred to and then there are those bombings. We all have in mind what that is.

The burglaries for which the Tort Claims Act claim is being made are the 92 that the plaintiffs say were revealed to them this spring.

Isn't that right?

MR. BOUDIN: Quite right.

THE COURT: So Mr. Boudin is not trying to, on behalf of his clients, make a claim as to burglaries that were alleged in the original complaint.

I'm repeating what has been said numerous

times, hat my view is that it is question of fact and the contents of the original complaint are part of the factual picture as to when these plaintiffs discovered, or should have discovered, their claims. The kind of claims they are asserting, it is not legally conclusive against the plaintiffs and I am prepared to say that right now.

MR. BRANDT: If I am --

MR. BOUDIN: May I interrupt for a moment?

Your Honor rendered a decision forty minutes ago and now Mr. Brandt is going on and on and on. It seems to me that at some point the time ought to come when a decision of the Court is accepted and we move forward.

THE COURT: I probably took you all by surprise by bringing this up. I just want to try, with all the work we have to do, not to spend time needlessly. I put my views on the record.

I am perfectly happy to have Mr. Brandt comment.

MR. BRANDT: Thank you, your Honor.

I was responding to your Honor's request that the Government respond to your Honor's ruling in spite of Mr. Boudin's remarks.

THE COURT: Go ahead.

MR. BRANDT: If I may, our memo of law, supplemental memo of law, we filed I think this morning and it was delivered to your Honor late yesterday evening, that argues that as a matter of law -- a matter of law -- Mr. Boudin's clients did not have to be aware of the unique features of the disruption program in order to start the accrual of the statute of limitations. Ir argues that they did not have to be aware of each and every entry in order to start the accrual of the statute of limitations. They did not have to be aware of each and every improper use of an informant in order to start the statute of limitations running under 2401(b), and we think that those questions are a matter of law and not of

fact.

We think that the record factually is sufficient at this point to demonstrate that the statute could start.

I think that the problem here is separating the factual issue from the legal one.

I believe, your Honor, that the memo of law really puts that issue very, very squarely.

THE COURT: It puts it squarely, but I don't agree with you. I don't agree with you. Your cases are not apposite here.

For instance, we don't know yet fully and precisely what it is Mr. Boudin's clients will be able to prove or attempt to prove in respect to the disruption program; therefore, how can I sit here and say that his claim is the same as something that was known or should have been known back two years earlier?

I would like to deal with a factual record

and when it is perfectly permissible, it is a very live issue. As these claims are proved or attempted to be proved, you can ask, you can inquire, in any way appropriate and as thoroughly as you want to inquire, on everything that would indicate when Mr.Boudin's clients knew of the type of thing they are proving, when they knew of related things,or when they knew of the general subject, but until we know more about the specifics of what Mr. Boudin will be trying to prove about the disruption program as respects his clients, I don't see how I can sit here and say that this is something that was known about at the time of the original complaint, or was known about at any other time.

I don't know when it was known or should have been known because I don't know what it is definitely that he is going to try to develop proof of.

MR. BRANDT: We do know what was in the original complaint.

THE COURT: We have said that many, many times, and I have read it and I have reread it.

MR. BRANDT: We believe, your Honor, that, as a matter of law, the issues that were raised in the original complaint started the statute running.

THE COURT: I think we are getting repetitious. I just ruled against you.

I disagree with you.

MR. BRANDT: I would also like to add that, as a matter of factual record, we have developed -- we have George Novak's deposition and his testimony and that is appended to Mr. Moseley's affidavit as Exhibit B, that it was common knowledge that Government informants "influenced the organization in injurious ways" from their mere presence in the organization.

The last part is not the quote.

We think we have developed the factual record sufficiently --

THE COURT: In my view it would be so inappropriate -- I can't tell you how inappropriate -- to throw out their claims on the basis of that kind of general statement.

MR. BRANDT: Let me ask two questions:

(a) Will your Honor permit a preliminary hearing on this?

THE COURT: What I would like to do is when we are all assembled together in the fall, I would, of course, consider doing that.

The question as to whether that is feasible depends on whether we really have a relatively simple isolated issue, or whether we simply get into a whole long range of proof which will in large part duplicate what will be done at the trial.

I don't know the answer to that. If it's

simple, if there are some fairly simple factual inquiries that can be made and resolve the statute of limitations issue and resolve it in your favor, or resolve it one way or the other, why, that's all to the good.

But what I would say to you is this: I would try to work out a plan, if you want to propose a separate preliminary trial, of what that trial would consist of, and discuss it with Mr. Boudin. Then Mr. Boudin can formulate his ideas of what a trial of that kind would consist of, and then we have to worry about whether it would end up being something that would have a lot of elements of a full trial. Maybe it would and maybe it would not.

But I'm not going to try to say now that I would have it. I would simply say that I think you are entitled to propose it because, you know, at a first blush the statute of limitations very often is a preliminary issue, a threshold issue.

I don't want to fall into the thing and then end up with a three-week trial.

MR. BRANDT: Let me suggest this in that regard:

We think that that would be a useful way for us to spend part of the month of August, but I think it would be very, very profitable for the Government if your Honor would give us a ruling, an opinion, concerning what precisely, what facts, need to be known in order that the statute of limitations start to accrue.

For example, is it the precise entry that occurred between 1960 and 1966? Is that what starts it? Or a general allegation concerning entries, would that start the accrual running? That's one of the issues which we believe and we --

THE COURT: What is your question?

MR. BRANDT: I think the question is this:

In order for the statute of limitations to run, what knowledge does plaintiff have to have? Do they have to have knowledge of the precise entry that occurred? Or would general knowledge concerning entries over a long period of time start the statute of limitations running?

THE COURT: It depends on what they are alleging. If they are alleging a cause of action on behalf of some plaintiff for a specific breakin, then it would seem to me -- I don't know what could occur otherwise, but just talking out loud, thinking out loud with you -- that the accurate of the cause of action would be the time when they knew or should have known about this specific breakin. When I say "they," I mean whoever is going to try to assert the claim.

If it is a general claim of conspiracy or plan about breakins in general -- maybe you have something different -- then the question would be

when they knew or should have known about that general claim.

As I understand it, the third type of claim asserted by the plaintiffs under the federal tort claim is specifically relating to the 92 specific breakins. I don't know exactly the form of that claim.

And I understand they are filing or are in the process of filing administrative claims. I don't know on whose behalf those claims will be filed. I have not seen them. I don't know if they have been filed, but --

I guess I can ask that right now.

MR. BOUDIN: They have been filed, yes.

THE COURT: Have you shown those to Mr. Brandt?

MR. JORDAN: Have you seen copies of those?

THE COURT: Give him copies and then we will have something concrete to talk about.

Who are they on behalf of?

MR. JORDAN: SWP and the YSA.

THE COURT: Those were the offices broken into?

MR. JORDAN: Yes.

MR. BRANDT: That is a six-month process.

THE COURT: That can be cut short if you want to deny the claims.

MR. BRANDT: The other thing is --

THE COURT: You asked a question and I'm trying to give you an answer.

As far as the disruption program --

MR. BOUDIN: May I raise an objection to this entire discussion? I object very strongly to the Government coming in after your Honor has made a decision and cross-examining your Honor.

This is not proper. Your Honor is not called upon to give an advisory opinion to Mr. Brandt because he doesn't like your opinion. The problem is not one of form or deference to the Court.

The point is in the examination by Mr. Brandt of your Honor who happens to be a judge and not a witness. I am not being able to intervene and to play a part in the thing. It goes right through everything the Government is doing here.

There must be a time when a matter can be accepted by the Government.

THE COURT: In about five minutes there is going to be a time.

I am trying not to be sticky here. I think I injected something into this hearing, and I feel somewhat apologetic for doing that, but, again, we have a hearing just about every day in this case.

If I can make myself clear this afternoon so I am not keeping you dangling to September as to what my views are, I think it is to your advantage.

If I waited and wrote some formal decision,

which I think is completely useless, I am sure it would be September before I would do it. I don't see any purpose in that nor do I really see any purpose in gathering for some further formal argument tomorrow or next week or any other time.

I think that we have gone into this so much and we will go into it another few minutes. This is repeating what we have talked about. But the reason I am going farther is because whenever it is, we come back to this either in a preliminary hearing or at the trial. We are going to have to frame the issues, and when you go into it on your discovery you are going to have some idea of the issues, so I am discussing with you the issues. That's all.

My ruling has been stated, as Mr. Boudin observes. The ruling, to repeat, that I am denying any and all applications by the Government to dismiss or strike the federal Tort Claims Act

claims against the Government as presently formulated in the letter of -- just so we have a reference, I guess that would be helpful.

MR. JORDAN: If you had our most recent memorandum, I think it's on page 2 of that, your Honor.

THE COURT: I happened to be looking at the Government's memorandum.

MR. MOSELEY: It's on page 4 of our memorandum.

THE COURT: Page 4 of the Government's memorandum, and pages 2 and 3 of the plaintiffs' memorandum; the plaintiffs' memorandum being dated July 27, 1976 and the Government's memorandum undated.

I wish the Government would date its memorandums.

MR. SIFFERT: The steno pool refuses to do that, your Honor.

THE COURT: In any event, I am denying the application to strike those claims, and I'm doing it because I think they are factual issues not resolved by the present record.

I will comment for another minute to give what guidance I can as to the issues.

It seems to me that with respect to the first claim about the disruption program, the issue is as follows:

How different is this claim from what was known or should have been known before the spring of 1975? And that really doesn't say anything. I don't know why I bother saying it, but, in other words, if this is something, the nature of the activity, and the purpose of the activity, that is, the use of letters, for instance, to accuse people of sexual misconduct so that their marital relationships are broken up, and that kind of thing, which was mentioned in the Church report,

if that was something involving a different method and perhaps a different purpose from what was revealed and known before, it may very well be enough to constitute a different claim stated as such, and, therefore, it may be that the question is: When did the plaintiffs know or should they have known of these different types of alleged activities and the purposes of such activities?

I think what I am saying now is pretty obvious. I think we can probably suspend.

I think in your discovery you should keep in mind the factual issues and develop them and then, if anybody in the fall wants to apply for a separate preliminary trial on these issues of jurisdiction or statute of limitations, federal Tort Claims Act, they are free to do it.

All right.

We have no further hearings scheduled, I understand.

MR. BRANDT. Your Honor, if I could take the opportunity at this point -- I know your Honor wants to finish today -- there are other practical considerations why we think this motion should be decided, if I can just make a suggestion.

May I address this in a letter to your Honor with a copy to Mr.Boudin concerning the practical considerations why your Honor might want to accelerate the process as to a decision?

THE COURT: To what date do you think I should accelerate it?

MR. BRANDT: That your Honor decide the issue of the statute of limitations --

THE COURT: Don't start a barrage of correspondence. This matter, as far as I am concerned, is off until the record is further developed and until someone -- after the beginning of September, when we are all back in New York, if anybody feels that they are ready for a preliminary trial using whatever is in the record now, and any additional

materials that are available now, if anybody wants to apply for a preliminary trial, if it's a short preliminary trial, that's fine.

But I tell you right now I'm not prepared to hand down any further ruling until that time.

MR. BOUDIN: And I wish your Honor and Mr. Brandt and your clerk a happy vacation.

I think we all deserve it.

APPENDIX C

Proceedings before the District Court of October 21, 1977

* * *

THE COURT: * * *

I invited the government at least a year ago to suggest a preliminary trial. You didn't so suggest. We spent all winter on the merits, so to speak, of the discovery problems, both with respect to the CIA and the FBI and also the YSA, and an immense amount of labor was undertaken throughout the two agencies.

I wasn't told you didn't need a decision on the merits and those things, and you won on two-thirds of your arguments. Then you lose, and you went up, and at no time did you ask for a preliminary trial, and then you went to the Court of Appeals and you talked about the possibility of a preliminary trial up there, having never requested it of me, and now, after you have lost in the Court of Appeals, despite the recommenda-

dations made to the district judge, you come back now and at this late date you ask about a preliminary trial. A lot, an immense amount of work has been done on these discovery problems by me, by your clients, and to some extent by Mr. Boudin's firm by way of briefing, although they didn't have any opportunity to see any of the materials and they were spared in a certain sense the labor of looking at all those cubic feet of files.

MR. MOSELEY: Your Honor --

THE COURT: As far as the preliminary trial on the statute of limitations question, I suggest from the standpoint of any sensible administration of this case, that that discussion should have been made at least a year ago.

MR. MOSELEY: Your Honor --

THE COURT: It wasn't --

MR. MOSELEY: Your Honor, in that connection --

THE COURT: And the Court of Appeals wasn't

really talking about that in any event.

MR. MOSELEY: The Court of Appeals, your Honor, suggested that the questions on need for disclosure could be resolved through the beginning of the trial.

THE COURT: I have read the Court of Appeals opinion. I am fully familiar with it, as we all are. I take it that you, according to this document which you handed me, you are now up in the Court of Appeals again.

MR. MOSELEY: Your Honor, we may be seeking reconsideration. The reason why I am here today is to ask your Honor whether we will have a modification of your Honor's order which will obviate the government's need to consider further appellate remedies.

If I may go back --

THE COURT: No. Look, as far as a preliminary trial on the statute of limitations, I will not have it. So the answer to that is, "No."

It is way too late for that. There is too much water over the dam. Your request is at least a year too late, I repeat.

There will be no preliminary trial on the statute of limitations.

MR. MOSELEY: If I may be heard, we don't envision that in any way as a delay or a preliminary trial. We believe that this is the way to proceed withthe entire case to trial.

THE COURT: Why didn't you make that request a year ago?

MR. MOSELEY: As I recall--

THE COURT: A lot of sweat would have been saved.

MR. MOSELEY: Indeed, it perhaps would have, but your Honor rejected that alternative specifically on the record of the transcript of April 14, 1977. Your Honor also directed us to--

THE COURT: That was April 1977, after most

of the work had been completed.

MR. MOSELEY: But that was at your Honor's direction earlier. The government, rightly or wrongly, followed in the pattern that your Honor directed for the consideration of these issues. We are suggesting here --

THE COURT: That is simply nottrue, Mr. Moseley. It is not true. If you can show me any application by you, a timely application -- and I am talking about an application made following my ruling on the government's motion to dismiss and before the very extensive labors through the winter of '76 and '77 about the FBI, the CIA, and the NSA discovery problems--if you will show me any application by you for a preliminary trial on the statute of limitations and any denial by me, I will certainly be happy to see it, and I will owe you a very deep apology.

At the time I denied your motion to dismiss,

I invited the government, if they wished, to propose a preliminary trial. I didn't make any commitment to hold it, but I said I would consider it.

I don't recall any further word from you. If something came from you in the spring of 1977 after all the work was over, that is not what I am talking about.

MR. MOSELEY: Your Honor--

THE COURT: You review the record and if you come up with something along that line I certainly will stand corrected.

MR. MOSELEY: Your Honor, if I may proceed along those lines, what happened is that motion to dismiss was an omnibus motion directed to all the plaintiffs' various causes of action.

Following the denial, the plaintiffs zeroed in on or honed in on the question of the informant issue. That was briefed at some length. As a

result of that, your Honor directed a procedure for the solution of that problem.

Perhaps at that time the government should have made a request --

THE COURT: What do you mean, at that time? You could have done it months before then. I ruled on your motion to dismiss in early August, if I am correct, or late July of 1976. What were you doing during the next six weeks?

MR. MOSELEY: During the next six weeks, your Honor, we were responding to a variety of your Honor's and plaintiffs' requests with respect to discovery. I don't think that is in essense responsive. The question here today is - the Court of Appeals suggests that this matter--as any number of large or major litigations; anti-trust litigations, my major experience--proceed with trial so that preliminarily the issues relevant to the kinds of discovery that introduced into the disclosure of privileged materials

can be resolved.

I don't think that is a delay in any way, shape or form.

THE COURT: What would those issues be?

MR. MOSELEY: The first and principal issue would be the statute of limitations.

THE COURT: That is exactly what I am talking about.

MR. MOSELEY: That is certainly one of them, your Honor. There are others. We believe provisions of the Federal Tort Claims Act would preclude the vast majority if not all the relief the plaintiffs seek in damages with respect to informants.

We believe those would be presented in brief and argued in a way that would get us around the problems that we largely face in respect to this and would obviate the further need of appellate review and protraction here.

THE COURT: What else do you propose?

MR. MOSELEY: That is what we propose, your Honor.

THE COURT: Well, let me say this--

MR. BOUDIN: Would your Honor care to hear me for a moment?

THE COURT: Just a moment. When I read the Court of Appeals opinion, and even now, I don't have in my memory all of our discussions and transactions that went on in connection with your motion to dismiss, which I think was before the Court a year and a half ago or so.

MR. MOSELEY: Approximately July of '76, your Honor.

THE COURT: We had extensive hearings about that, at which time Mr. Boudin even made more precise his clients' claims against the government. After that was done, we had a discussion as to whether his administrative claim was too late, and so forth.

That is all down on the record, but as so often happens, the discussions in Court went way beyond what was in the briefs. Although it is somewhat tortuous to get through all of that, there were points that needed to be clarified.

There is a lot in the hearings that was not in any brief or affidavit. Therefore, one has to go over the whole business to really find out what positions were taken at that time and so forth. I have asked my law clerk to go into that again, to review all of those materials.

I want to refresh my memory as to what exactly went on. Whether we have a preliminary trial or whether you go up into more appellate review, it still ultimately is going to be important to go over that and know exactly what transpired and get that fresh in mind.

Although it wasn't in any decision filed, the ultimate ruling I made--you are aware of it

and everybody concerned with the case was aware also--was that as far as the question of the timeliness of the administrative claims--I think that was the gut issue on the statute of limitations problem--as far as that issue was concerned, the timeliness depended upon when the plaintiffs knew or should have known about the matters covered in one or more administrative claims.

If they knew or should have known about those matters two years or more before the filing of those claims, they are barred, to the extent such a situation should be found.

If they didn't, then they are not barred.

The government took a position that the original complaint in the action indicated that the plaintiffs should have known of all the claims made in administrative claims two or more years after the filing of the complaint.

We had a long discussion about whether that

is an acceptable way to handle the problem or not. I concluded--and I think I would conclude today, if I was deciding the motion today--that that is a drastic oversimplification of the problem, that it was perfectly apparent to me from a reading of the complaint that the plaintiffs had some information on which to base a complaint, but that at later points in different stages they learned much more about claims, and that the time when they knew or should have known of all or most of what they are claiming against the government because of the activity of the FBI--the time when they knew or should have known of those matters occurred well after the filing of the original complaint.

To the extent that they knew or should have known the matters covered in the original complaint, if that was two or more years before the filing of administrative claims, all of that should be barred.

But that does not begin to cover the entire case. In any event, I did not attempt rule conclusively even as to what I am saying, because I held, I believe, that these raised issues of fact. The issue of when the plaintiffs knew or should have known of certain claims, these are issues of fact.

I further felt that the issues of fact as to when the plaintiffs knew or should have known of the claims against the FBI was very much bound up with the evidence as to what those claims were and the evidence about not just what the claims were in a pleading sense, but the facts about what underlay those claims.

We can talk forever in theory about whether the plaintiffs have a good cause of action for tresspass or interference with relationships, but we don't really know much about it until we get the evidence.

My feeling was--this was what I ruled--that you have a complex range of issues of fact which relate to the merits, which relate to the questions of knowledge or when knowledge should have occurred, and certainly it was inappropriate on the basis of a few pleadings and affidavits to decide those issues.

The net of it was that I felt that evidence had to be developed, whether it related to questions of knowledge on the part of the plaintiffs or questions of merits, and there they were probably very, very closely intertwined.

That is what led to the discovery proceeding.

* * *

The suggestion that there has been ample discovery is simply incorrect. The fact that lots of sets of interrogatory answers have been filed and lots of documents have been produced, that is just totally beside the point. Anybody

who bothered to go over the record and see what was produced and was not produced would know that in an instant. Well, not in an instant, but they would know it.

Just to elaborate slightly on that point, during the production of documents which was had from the FBI, the topics of that production were all discussed in a hearing that we had.

MR. MOSELEY: In April and May of '76, your Honor?

THE COURT: Right. At that time certain topics were selected, certain types of activity were selected, and the FBI was to produce documents. At that time -- this is terribly important for anybody to realize, if they are going to get to first base with this problem -- the problem of discovery about informants was simply deferred. It was with full knowledge that the informant activity was the most important activity

undertaken by the FBI against the YSA. The record is replete with that. It was decided that the FBI would produce the documents on subjects such as burglaries, wiretaps, any kind of disruption activity, such as poison pen letters, etc., etc. There was a list of ten or twelve activities at issue in this litigation. One of the ten or twelve was the use of informants. It was decided that the FBI would produce the documents on all or most of the other topics. Right, Mr. Moseley?

MR. MOSELEY: That is generally correct, your Honor.

THE COURT: Fine. As to the informant subject -- which we understood was an extensive subject, difficult subject because it was the most important activity of the FBI against the SWP, and at the same time it was impossible to produce those documents without yielding up what the FBI considered was confidential information --

because of that very difficult problem, there was no discovery on that subject at that time. It was deferred. It was deferred, and the device that was attempted as a preliminary thing was that instead of the production of the documents on this subject the government would answer interrogatories. It was understood that that was a first step.

The idea of having the interrogatories done was to take the subject of the informants in very slow, very careful steps, see what could be done with the interrogatory answers, and go from there. At no time was it agreed that there would be no production of informant files or that the interrogatory answers would do the whole job. It was simply a recognition that this was a difficult subject and would be taken in slow steps.

The interrogatory answers came in. The interrogatory answers, I will state categorically,

do not supply anything approaching information which could possibly meet the evidence requirements of a plaintiff or a litigant in any case tried practically anywhere. They are bare bones; they furnish some preliminary information, and that is all.

We also found last summer that to some extent they were incorrect and incomplete, even as to the topics covered. The history of the summer of 1976 is history. The Redfern matter came up, showing what was obviously an intentional falsification in at least one interrogatory answer furnished by the FBI. The Redfern file, since his identity as an informer was disclosed, his file was produced. About six or seven other files were produced voluntarily of informants whose identities were known to the plaintiffs. That production was almost a fortuity. Redfern's identity was known through a fortuity, and

from some other means, the plaintiffs learned or six or seven other identities of informants. Nobody ever thought that these were the most important informants or, to say the least, that they were complete, since they were six or seven or eight out of 1300.

All of which is to say that, despite all the labor and despite the thousands of documents produced at that point or how many interrogatory answers or how many sheets of paper or forms had been filled out, the subject of the disclosure of the evidence about informants simply was not solved. Nobody contended it was; nobody contended that the discovery was complete on that issue. If anybody so represented to the Court of Appeals, they were simply falsifying.

That led to the proceedings of the winter of '76 and the spring of '77, which we all know about, and the motion of the plaintiffs for the

production of 19 informant files, which they had selected out of the 1300, because they felt these were representative samples. What I am getting at it -- and there is more to be said -- is that I feel that it is really beyond any contest, if anybody looks at the record, that the discovery on what I will repeat is the most important activity of the FBI against the plaintiffs was never completed, it was barely begun. It is very unfortunate that there was a lot of other documents supplied. It is unfortunate that people had to go to work in sanitizing those other documents, and so forth, but that is the nature of this case. This case is not a simple case. It is just the nature of the case.

If the plaintiffs don't have any reason, any legitimate reason to go to trial on damage claims because of the use of informants,then of course there would be no reason in the world to have

the production of these files. Let me phrase it another way; I am trying to think out loud on the issue. If the government had been right or were right today that the damage action against the United States of America because of the FBI activity, if the government is right that that claim should be dismissed or that there is no valid reason for a trial on the merits of that claim, then to me it follows unequivocably that there is no reason for the discovery of these files.

However, if there is a triable damage claim against the United States because of informant activity, there is no way in the world for that to be handled in any just and fair manner without the evidence. That evidence has not been produced. There is no question about that in my mind, whatsoever, that that evidence simply has not been produced. There may be all kinds

of knowledge of certain types of activity. The record is fairly clear that certain types of activities were undertaken: burglaries; other forms of misappropriation of documents; certain disruptive activities,and so forth. I emphasize the word "type." I don't know of anybody, any plaintiff who can go to trial on a damage claim and simply tell the jury the "type" of activity that was engaged in by the defendant.

Let us suppose a malpractice action. Let us suppose that the plaintiff sought to introduce proof about what went on in the hospital: she had an operation; she came out of the operation; she had a certain severe problem in her throat, something seemed to be stuck there. Then the plaintiff's attorney sought to ask her about the extent of the pain: what physical manifestations were caused, how long they were caused, and so forth. The judge said, "I know the type of the

activity, and that is all that is needed."

That would be absurd. This is an elementary illustration. Isn't a plaintiff who is seeking to prove damages entitled to show the extent, the magnitude, the duration of the problem? It generally makes the difference between whether the damage award in a particular kind of case is $10,000 or 10 times $10,000 or less than $10,000. Isn't a plaintiff entitled to show that she was in pain for seven weeks versus one week?

That is basically what we have here. We may know a lot about the types of activity. When I say "we," the publicly disclosed evidence may show something about that. But does it show the magnitude, the number of people affected, the number of branches affected? Is there anything in the record so far that any trier of fact could use to make an intelligent assessment of the quantum of damages? There is not. If quantum of

damages is irrelevant to this case, then maybe we have got a different story, but I assume that in a damage case you are worried about the quantum.

This is not a simple malpractice case. This is a case where the plaintiff organization consists of chapters, it consists of members. You have got activities of one kind or another that are alleged to have gone on here and there, different kinds of activities over different periods of time, and so forth. It is a long way of saying that if the government is going to think intelligently in the future, or anybody else is, why, that is at least one important reason for not passing off this document business as simply duplicative of what has already been produced. If anybody suggested to the Court of Appeals that it was duplicative, I say quite frankly that you were misleading the Court. I don't know whether you did, but you certainly ought to correct that in any future proceedings.

* * *

APPENDIX D

Proceedings Before the District Court of
November 3, 1977

THE COURT: Since our last meeting my law clerk and I have been reviewing the materials submitted to the Court on the motion to dismiss the damages claim against the United States of America, and we have been reviewing the discovery materials in relation to the FBI informants.

Now, it is unfortunate in a way that we have to get involved in what in a sense is treading water, going over material covered over a year ago.

However, the Court of Appeals in its decision voices the view that there is a forcible argument that plaintiffs have no cause of action under the Federal Tort Claims Act.

And out of an abundance of caution I wanted to find out if there was indeed sound grounds for either dismissing the Tort Claims Act claims or having a preliminary determination.

I think that at each stage the Court ought to be reasonably flexible. Certainly the Court of Appeals' suggestions are ones that should be seriously weighed.

Now, I think that the renewed labor over this topic has really reinforced my view that there is no justification in dismissing the Federal Tort Claims Act damage claims against the United States of America under the present record or on the present record.

I have gone over this and my law clerk has gone over this at great length and with great labor in the last few days and weeks which, as I say, was a repetition and a review of the work that was done by me and another law clerk over a year ago.

Now, I think as you inevitably do, you learn some new things, and I feel that the review has been productive, and I hope it will ultimately be helpful.

I would like to try not to make a lengthy statement about this subject because the matter was pretty well covered in the minutes of those hearings in July of 1976, the last of which on this subject was July 29th.

I think the others were July 8th and July 13th.

Now, a great emphasis was placed by the government on the idea that the original complaint in this action filed July 18, 1973, indicated that the plaintiffs knew or should have known about the basic features of their tort claims against the government at the time of this complaint. The government insists that it is virtually conclusive evidence of knowledge of the nature of the tort claims against the government.

The government further contends that there was no administrative claim filed until about two years later.

I think the first administrative claim was July 17, 1975. And the government would, of course, argue that whatever was known and whatever was presented in the complaint wasn't suddenly known on July 18, 1973, so it must have been known at least a few days earlier, and the net of it being that whatever was known at the time of the filing of the original complaint was known more than two years before the first administrative claim.

Now, the administrative claim filed on July 17, 1975 was on behalf of the Socialist Workers Party and the Young Socialist Alliance against the Federal Bureau of Investigation, and it referred to the so-called Socialist Workers Party disruption program.

There was a second administrative claim filed on July 22, 1976, again on behalf of the Socialist Workers Party and the Young Socialist Alliance, and that referred to -- that was against the FBI and referred to the Communist

Party U.S.A. Counterintelligence Program, and the Counterintelligence New Left Program of the FBI, which is alleged to have affected the plaintiffs here, although perhaps not being denominated as such.

There was a third administrative claim filed July 22, 1976 on behalf of the SWP and the YSA against the FBI alleging that beginning in 1958 and going through to 1966, the FBI committed more than 100 burglaries in New York City and elsewhere. There were some administrative claims against the Secretary of the Army and the NSA. I'll put those aside for the moment. There was an administrative claim against the CIA. Again, I'm going to put that aside for the moment and I'm also putting aside the October 3, 1975, administrative claims on behalf of Sell and Starsky against the FBI.

This brings us to the final administrative claims against the FBI, which I don't think I

mentioned. There were two claims filed on October 28, 1976, both on behalf of the SWP and the YSA against the FBI, and one of them refers to the allegation that on hundreds of occasions FBI employees and confidential informants broke into claimant's premises and removed documents.

The other refers to the allegation that FBI employees caused confidential informants with the SWP and YSA to engage in a variety of activities including disruption of the normal organizational programs, manipulation and control of the organizations burglaries and thefts, and gathering information which was not lawfully gathered.

Now, the basic question as far as limitations is whether the plaintiffs who make these administrative claims knew or should have known of the causes of action, so to speak, more than two years before the filing of these claims.

Now, with respect to the pleadings, the original complaint does not name the United States of America as a defendant. It is against certain officials named by official title such as the Director of the Federal Bureau of Investigation, et cetera. It is then against certain named individuals such as Richard N. Nixon, Robert C. Mardian, Tom Charles Huston, and so on, and then at the end of the caption there is the nomenclature, "Unknown agents of the United States Government."

The original complaint sought injunctive relief and relief by way of damages against certain individuals, and that relief was solely sought under Federal law, under the First Amendment, the Fourth Amendment, under 42 U.S.C. 1983, under 18 U.S.C. 2520, and under 42 U.S.C. 1985.

The damages that were sought were sought from defendants Nixon, Ehrlichman, Haldeman, Dean, Huston and Mardian and the unknown agents.

Now, except for motions addressed to service of process, I don't believe there has been any motion to dismiss the original complaint for failure to state a claim, and I think it is safe to say that as a matter of pleading these Federal claims are well pleaded. Whether they have merit or not on the facts, that remains to be seen.

MR. MOSELEY: There was indeed a pending motion as to Mr. Nixon.

THE COURT: That is right.

MR. MOSELEY: In his official capacity.

THE COURT: Because of his official capacity. But I think the fact remains that as far as the ability to plead claims under these Federal laws against these individuals, either for injunctive relief or damages, I don't think --

MR. MOSELEY: There is no motion.

THE COURT: All right, thank you very much.

If I recall correctly, the first pleading

against the United States of America for damages was in the second amended complaint.

Isn't that right?

MR. MOSELEY: It was actually in the first amended complaint, your Honor, which was filed in May of 1976, but circulated, I believe, earlier, approximately in April.

THE COURT: Let's say the first pleading against the United States was May of 1976. Then there was a good deal of clarification introduced by a pleading in the second amended complaint --

MR. MOSELEY: Actually filed in October, though it had been circulated some time before that.

THE COURT: We were using it. The second amended complaint was in effect at the time of the July, 1976, hearings. We were relying on it and discussing it.

MR. MOSELEY: That is right.

THE COURT: Again, as we did at that time, I have analyzed the first complaint and I have analyzed the affidavits as to what was or was not known about damage causes of action at the time of the first complaint back in 1973, and I would just like to repeat some of that for the moment.

In general, it seems to me that the information which lay at the basis of this original complaint was tentative. Certain specific acts and activities were alleged, but in general the perpetrators of those acts and activities were not known as far as can be seen from the pleading. The first complaint does not reveal to me any knowledge which I would require or make possible a specific Tort Claims Act violation against the United States of America directed at a particular agency, specifying the date and place where the acts are committed, indicating the type of tort referred to, and so forth.

Now, there were specific acts known and alleged. There were certain further alleged burglaries. For instance, in Paragraph 66 there is an allegation that the SWP had offices in Detroit entered. In Paragraph 67 there is an allegation that an apartment in Detroit of Charles Balduc was entered. In Paragraph 68 there is an allegation that an apartment of Norman Oliver in Brooklyn was entered. But Paragraph 69, says "On information and belief, the persons who planned and participated in the burglaries were agents of the FBI, the Treasury Department, the CIA,Department of Defense, the National Security Department agents, or all of them" I don't believe that the information possessed by the plaintiff was any more specific than that.

One other reference I want to make to the first complaint. There are allegations against the FBI beginning at about Paragraph 39. There

are allegations that the FBI singled out for interrogation and surveillance the SWP and its members and supporters in various cities.

In Paragraph 40 of the original complaints there is an allegation that on many occasions FBI agents attempted to induce members and did induce supporters of the SWP to become government agents for the purpose of spying upon other members and supporters and of interfering with lawful campaigning or organizing.

There is an allegation in Paragraph 43 that on many occasions FBI agents threatened to and did disclose members' affiliation with the SWP and the YSA to their families, employers, prospective employers, landlords and others with the purpose and effect of provoking hostility and discrimination against SWP members and supporters.

Thus the first complaint was based on certain information, but very incomplete information and it started an action which according to the

normal rules of pleading, would be susceptible to discovery and, furthermore, would be susceptible to amendments to add additional parties under the rules and to add additional claims or amend the claims to conform to information later uncovered by way of discovery or otherwise. Our rules provide for amendments to amend the nature of the claims and to change the identity of the parties, and that is exactly what has happened, and it has been a legitimate process.

Moreover, despite plaintiffs' lack of knowledge of many specific details at the outset and indeed to this day, the suit has hardly been a baseless fishing expedition.

Now we come to the first administrative claim. It is the claim of July 17, 1975, and it is in relation to the disruption program. It is perfectly clear, and the record leaves no doubt, that the disruption program was characterized by

activities such as poison pen letters and so forth which have been described in the Church Committee report. This program was revealed to the plaintiffs no earlier than the Fall of 1974. That is less than two years before the administrative claim of July 17, 1975.

The Disruption Program involved FBI activities substantially different from what plaintiffs knew or should have known before the fall of 1974. The evidence presently before the court strongly supports the view that the administrative claim of July 17, 1975 was timely filed.

As to the activities of the FBI in relation to the Communist Party COINTELPRO program, these were first revealed to plaintiffs in the fall of 1974. Thus, as far as the evidence now on record shows, the administrative claim of July 1976 on this subject was timely.

It is clear beyond question that the revelations about the 92 or so burglaries by the New York office of the FBI came well within two years before July 22, 1976. In my view these specific burglaries furnished the grounds for specific claims under the Federal Tort Claims Act and there was no reason for the SWP or the YSA to know of them prior to two years before July 22, 1976.

Now we come to the two administrative claims of October 28, 1976, and they refer to the activities of FBI informants. This raises a question which involves some difficulty. Certainly the original complaint filed in July, 1973, and indeed the affidavits of plaintiffs' representatives indicate that in a general way the plaintiffs knew of the use of informants back in the summer of 1973 and presumably before that -- in any event, well before two years prior to October 28, 1976. However, in order to make

a proper claim under the Federal Tort Claims Act, the claimant must allege the nature of the illegal act and the place where the act occurred, all with a view of proving a tortious act under the law of the place of occurrence. But it is clear that, due to the inevitable secrecy in which the FBI informants functioned, the specific nature and location of the informant activities have been largely concealed from plaintiffs.

In other words, plaintiffs had grounds to commence an action inJuly 1973 alleging serious violations of constitutional rights. Information obtained since then by discovery and otherwise has confirmed the gravity of these claims. And one important aspect of the case is the penetration of the plaintiff organizations by informants. But, as to what specific torts may have been committed under state laws by the FBI and its informants, this information is largely unknown

to plaintiffs even today. The primary source of such information is the FBI files, which, as yet, plaintiffs have not had access to. These files, some of which have been examined by the Court, indicate potential causes of action under state law, arising from informant activities, for trespass, conversion, invasion of privacy, interference with business relationships, possible violations of state statutes and constitutions, prima facie tort, and possibly others.

I return to the two generally stated administrative claims about informant activities filed October 28, 1976. Certainly I cannot hold that plaintiffs knew or should have known their Federal Tort Claims Act claims for informant activities more than two years before that date.

Now, I return to the problem of whether the Court is providing for simply a fishing expedition in allowing plaintiffs' counsel to have access to

this evidence and information. The Court of Appeals warned that there should be precautions taken against disclosure for which there is no substantial need and to unnecessary rummaging in government files, and the Court of Appeals, of course, was stating the truth when it warned that here we have a particularly sensitive area because we have informant files.

I have attempted to conduct the discovery proceedings about the informant files in a manner which was as deliberate as possible, as cautious as possible, and to insure the absolute minimum public revelation of informant identities or information leading to a disclosure of such identities. That is why we consumed literally months and consumed undoubtedly a tremendous amount of labor on the part of the government and its lawyers and agents in the work that was done last winter which was to make sure this problem is dealt with as circumspectly as possible. But stating it in a

general way, it seems to me practically beyond contest that the plaintiffs have filed an action which is not a frivolous or substanceless action. The trial has not yet occurred and I don't know who will win or who will lose, but at every stage the action has been shown to raise grave issues and it seems to me that the discovery which the Court is now attempting to provide for is anything but a fishing expedition. It is designed to provide legitimate information and evidence to the plaintiffs in order for them to go to trial on the cause of action in order for them to find out information which will enable them to comply with the administrative requirements, all of which are legitimate objectives.

I have reviewed again the discovery thus far provided. I have reviewed the answers to interrogatories about the informant program, and without going into detain it is simply beyond any question that the interrogatory answers do not begin to

provide the evidence necessary for the prosecution of plaintiffs' claims. They were never intended to do this, and there is no lawyer that I can even conceive of who would believe that he could go to trial or prepare for trial on the basis of those interrogatory answers. It is my firm memory that they were intended to be preliminary only, and that indeed they were designed so they would not reveal either the informant identities or even enough information about the activities as to lead to the disclosure of informant identities. They were so designed for that purpose and that is the limit. They are preliminary only and they do not supply information about the activities undertaken, the places of those activities, the extent of the activities, et cetera, et cetera.

I want to conclude this statement by suggesting this: I know that the government has

obtained an extension of time in the Court of Appeals until November 16 in order to determine whether it will file for a rehearing or file for a Supreme Court review. I guess it is just rehearing.

MR. MOSELEY: Yes, your Honor, just rehearing.

THE COURT: I certainly have no intention of interfering with the jurisdiction of the Court of Appeals by ordering any production of files pending the completion of the proceedings in the Court of Appeals. I would, however,suggest this for the consideration of the government and of the plaintiffs' counsel: one of the things that I expressly attempted to cover in my ruling which, led to the Court of Appeals proceeding was the handling of the entire number of FBI informant files numbering some 1300. The actual motion for files related to 19 files. I think the government has conceded on one, so we are really down to a contested 18. I don't was to mislead the

government and I certainly don't want to mislead the Court of Appeals and lull anybody into thinking that the problem is less than it is, because what I said in my original ruling I meant and I mean, but I would perhaps offer this suggestion. I'm aware that any attempt to deal with 300 or 1300 files is a mammoth task and regardless of the informant problem, it is a huge task.

Now, I would welcome any suggestion as to the most efficient way to proceed to resolution of this case, and I think that I would like to suggest: I would like to suggest that we go forward with the production of the 18 files in question. I'm not saying I'm going to order it before the Court of Appeals finishes, but I'm just saying the appropriate time, when the air is clear on that subject, and if I'm not mandamused, I would propose this; I think it would be desirable as quickly as possible to get those 18 files produced, and, as of now, the Court of Appeals has said that it was in my discretion to go forward with

the proceedings which I did about those files. The public and the press and all gathered should clearly understand, if they don't already, that the production of those files was strictly to plaintiffs' counsel with the strictest orders that they not disclose any information therein or any names therein to anybody outside the circle of counsel, and I have no doubt, nor did the Court of Appeals, as to the ability and willingness of plaintiffs' counsel to comply. And I should say as an aside, that there was a further confidentiality restriction imposed at the time of our original proceedings and that was that even this procedure was not to be disclosed, and I will say that to my knowledge there was no breach of any particle of my direction by plaintiffs' counsel or anyone else, and that the only time and the only occasion when the procedure was disclosed publicly was when the Court of Appeals in its wisdom ordered the disclosure of the pro-

cedure. Up to that time I have no reason to believe that there was the slightest leak, the slightest violation of my admonitions.

Going back, I would suggest from my knowledge of those files that they are indeed quite a good sampling of what I believe is probably contained in a broad number of files. I think they are a far better sampling that the six or seven that were produced voluntarily in the summer of 1976. It is my faith that the plaintiffs will learn a great deal from the review of those files and that after they have reviewed them we will be able to get together and we will be able to discuss, I believe -- this is practically for the first time -- this intelligently with both the plaintiffs and the defendants participating exactly what claims can be legitimately made for damages, what cannot be, how to handle the statute of limitations problems, the question of whether a

preliminary trial on that issue might be useful at that point, and a lot of other questions which really are being held in abeyance now because the plaintiffs don't have the evidence.

I would be agreeable to any application after the plaintiffs have reviewed the 18 files, any application or any suggestion on how to proceed in the most efficient manner, including if the government applied for a preliminary trial on the statute of limitations at this point, I would consider the application.

The government suggests we have a simple trial on the statute of limitations now. I cannot accept that request. I believe that it would not add anything to the record which now exists.

Secondly, I remind you that at the July 29, 1976, hearing I must have said a dozen times that I would welcome an application from the government for a preliminary trial provided they would show that it would not be a long thing, getting

into the full merits of the case.

Now,I don't think that application ever came to me at least until after the work had been done on the discovery. It just does not make sense to me to now go back and pretend we are at September, 1976, and have a preliminary trial.

* * *

I believe that by having the in camera proceeding in which Mr. Boudin and his associates cooperated, I believe that the public disclosure of informants and files will be less, not more, than they would be if Mr. Boudin did not participate in that way.

If this is going to be a matter of the Court determining ex parte the files that will on an individual basis that will be disclosed publicly, I have a rather strong suspic.on that more files would be disclosed publicly than if we can work with Mr. Boudin on a confidential basis. That was one of the main reasons for adopting the pro-

cedure I did. And I have every confidence that that is the fact.

* * *

APPENDIX E

Proceedings Before the District Court of January 27, 1978

THE COURT: Good morning.

This is an in camera session attended only by the Court and by attorneys for the government and for the plaintiffs.

The transcript of this session will be under seal and until further order will not be disclosed to anyone other than the persons present, plus other representatives of the Department of Justice, and also representatives of the FBI.

The background of this hearing is laid out in prior transcripts, but to summarize briefly, the problem we are dealing with relates to the motion made in the fall of 1976 by the plaintiffs for the production of nineteen FBI informant files.

After a lengthy consideration of that motion I ruled in the spring of 1977 that eighteen of those files should be produced to plaintiffs'

counsel under confidentiality restrictions.

One of the files had been produced voluntarily so it is not in issue any longer.

This led to a mandamus proceeding in the Court of Appeals. There was an opinion handed down on October 11, 1977, defining the mandamus but making certain recommendations as to the conduct of discovery on this problem.

The government filed a petition for rehearing with a suggestion of an en banc hearing on November 16, 1977.

No word has been heard thus far as to that rehearing petition, although more than two months have elapsed.

This means that the discovery process on this crucial aspect of the case has been held up now for well over a year, and many months of that have been involved with appellate proceedings.

It has been discussed among the parties and the Court how to resolve the matter and avoid

further appellate proceedings, including a possible request by one of the parties for a Supreme Court review, even after the Court of Appeals has acted finally.

This leads to the proposal which I suggested to the parties and which I am going to make specific now.

Further, by way of introduction, let me say that I regarded then and still regard the procedure that I ordered last spring as having very distinct advantages, both to the Court and the parties. However, the FBI regards the procedure as having very distinct disadvantages from its standpoint, and has indicated in the Court of Appeals and to me that they strongly object to the fact that the District Court has not made a file-by-file review and exercised its discretion on this basis in determining whether a given file should or should not be produced.

This is a somewhat new position because originally the government didn't even proffer the files for inspection and made a blanket opposition. However, this is their current position and I regard it seriously, as I am sure it is intended to be taken.

Furthermore, the government has stated both to me and the Court of Appeals that it does not regard the confidentiality restriction to plaintiffs' attorneys as having any value to the FBI.

Implicit in this, and I think, expressed, is that if there is to be disclosure, it might as well be nornal disclosure by way of discovery.

My view of all of these problems is that there is no immutable right way or one right way to handle discovery. I am quite sure that there are or should be different means open to the discretion of the Court, and consequently I am quite willing to consider an alternative means of handling the discovery of the FBI informant files,

which I hope will permit us to get back to work in the preparation of the trial of the case, and avoid further appellate proceedings. At the same time I can recognize arguable legitimate positions of the different parties. Consequently, I propose the following:

I will nowoutline in some detail a list of the files which I propose should be produced in discovery and a list of the files which I believe should not be produced in discovery.

I am referring, of course, to the eighteen files in question.

In other words, to save repetition, I will simply state that in my view the files, which I would order produced, are files whose necessity in the litigation of this case strongly outweighs any interests of the FBI or the informants in confidentiality.

As to the files which I would not order to be produced I am not saying that they are not

relevant to the case nor am I retreating from the idea that if there could be or if there were to be a confidential production to plaintiffs' counsel, I am sure that the production of these files would have some value to the plaintiffs' attorneys in arguing and preparing their case.

However, it is quite apparent and it has been throughout the case that the discovery and the presentation of the evidence has to be made on a selective basis. It is simply impossible for the plaintiffs' attorneys or for the Court to deal with every scrap of paper in the informant files and to have all of this material received into evidence.

Exactly how the selection is made and what the selection is, is a very difficult problem, but obviously there are different ways of approaching it.

The files that I have selected for production, and I have several reasons:

One,is that I find that they have certain unique features as far as the informant activities of the informant. To some extent I find that they offer necessary and good illustrations of the types of activities which appear to have gone on, and that they can serve to some extent as what I might call prototypes of informant activities which probably are revealed many, many times through the files as a whole.

I have declined to produce or I would exclude from production files which I think are less helpful, where it is in the interest of the particular informant in confidentiality because of health or age problems or other considerations is quite pressing, and where I think that the evidence can be developed on a statistical or some other basis.

One other final introductory remark.

There have been long discussions over these

months as to the relevancy of this material to valid causes of action. I don't want to belabor that any further. To me it is absolutely obvious that these mattesr are of the greatest relevancy if this action is to be prosecuted further at all for injunctive relief or damages.

I have at times considered that the degree of discovery, if this were simply an injunctive relief case, would be less than if it were for the damage claims.

The cause of action for injunctive relief is still a very live one despite various alterations in the Justice Department process. The government conceded that it is a very live case and is proposing extensive discovery to rebut the plaintiffs' contentions of illegal and unjustified activity. So the cause of action for injunctive relief is undoubtedly going to turn out to be very much of a live cause of action, and of course, there are the causes of action for damages which

we have discussed extensively.

You have at the basis of the action a claim of a very serious violation of First Amendment, Fourth Amendment rights in the close surveillance of private, peaceful activities over many, many years. That's the plaintiffs' claim. It poses a very grave constitutional question.

The FBI, on the other hand, contends that its activities were justified, so that's the issue.

As far as state law claims under the Federal Tort Claims Act, I have been over these before, but there is no doubt that the plaintiffs have triable claims under a variety of theories of state law, which they are entitled to go forward with and develop, and of course the defendants are entitled to attempt to rebut.

Those claims are the types of theories under state law which are trespass, conversion, misappropriation of property entrusted to someone's

care. I think the one term that is used is trespass to chattels, various possible violations of state constitution and state statutes - invasion of privacy, and the concept of prima facie tort which has to be taken seriously under the present circumstances.

Finally, to the specifics. I would propose to order the production of the following files. I will refer to these by number.

6: 53, 148, 220, 306, 311, 616, 1123, and I am also including 1321.

I would propose under these circumstances not to produce the files 73, 162, 176, 311, 675, 1007, 1121, 1211, and 1350.

I should note at the outset of the discussion that among the many considerations that I dealt with was whatever indication there was that the particular informant had or had not indicated a willingness to testify in court.

But, I also considered the testimony of Mr. Adams at the hearing of November 4, 1976, and his affidavit and certain documents produced.

I have particular reference to what is called SAC letter 68-14, dated February 20, 1968, which says in part, "As a general rule all of our security informants are considered available for interview by departmental attorneys and for testimony if needed."

Dealing with these on a file-by-file basis, the first is No. 6.

This informant served over a period of many years up to 1976, and held numerous positions in the SWP chapter, including recording secretary, delegate to the SWP National Conventions and membership on the local executive committee.

The file is remarkable for the sheer detail and breadth of the reporting.

The summary prepared by the FBI of the file itself is over 100 pages long. There are 22

pages of this summary containing lists of the very extensive amount of documents which were provided by this informant to the FBI.

This informant reported on the chapter's discussion on the split of the so-called International Tendency Group from the SWP, and the readmittance of that group to the SWP in 1975.

A great deal of private personal information about SWP members was provided to the FBI on a continuous basis.

On certain occasions the informant indicated an unwillingness to testify, but the FBI considered that informant under certain circumstances should be considered available to give testimony.

It is perfectly clear from the summary that the very extensive document production made by this informant to the FBI resulted from the access which this informant had to documents by way of being recording secretary and having other

positions.

Due to the type of questions asked in the interrogatories, to the FBI, it was not literally required to reveal that this person had the post of recording secretary and was a member of the executive committee.

The interrogatories did ask how various documents were obtained and for most of the documents, the answer is "unknown."

That really constituted misleading answers because it is perfectly obvious from the file that the reason all of his great amount of documentary material was taken and produced to the FBI was that the person had the position of recording secretary, executive committee member, and so forth.

However, this was not revealed in the answers. I regard the answers to the interrogatories as misleading and incomplete.

I will now deal with No. 53. This is a situation where the informant was not an SWP member, but was a confidant of a high ranking SWP officer, at least within the whole branch.

Through this confidential status and friendship the informant really had access to and was privy to the decisions and deliberations that went on in the SWP branch.

(Deleted by order of the District Court)

Naturally this gave the informant access to documents, and documents were thus turned over to the FBI.

This informant received very substantial compensation during the time of activity amounting to $250 to $350 a month, depending on the particular time period. This informant turned over intimate personal information which she had obtained, including information about cohabitation of SWP members, education plans, travel plans, employment plans, health and drinking

problems. This information was provided continuously and in great detail.

The method of obtaining the documents was readily apparent from the files, and for some reason, whoever answered the interrogatories either listed "unknown" in respose to the question of how documents were obtained, or made some other types of answers which carefully avoided revealing the actual relationship and methods used.

It should be noted that upon the arrest and investigation of an informant Timothy Redfearn on unrelated matters, and the revelation that the answers to interrogatories about the FBI informants were false at least as to Redfearn, the FBI filed supplemental affidavits purporting to correct certain of the interrogatory responses. These corrections were made in October 1976. The original responses were filed in June 1976. I

should say that, even if the interrogatories had been answered with total accuracy and completeness, the answers would in no way substitute for the detailed evidence contained in the files which I am proposing to produce. The interrogatories and the answers thereto were never intended to take the place of detailed evidence.

In a supplemental affidavit filed October 15, 1976, about No. 53, the FBI sought to correct the statement made in the interrogatory answers that the mode by which this informant obtained documents was unknown. The affidavit stated the "informant had regular access to documents and premises controlled by SWP and YSA sources." However, as noted above, even this response is incomplete in failing to mention the friendship of the inform ant with a high-ranking SWP official (deleted by order of the District Court).

This informant who has consistently indicated that she didn't desire to testify or be dis-

closed -- I might say as a general thing here, and I think it is probably covered by what I have already said, that I have carefully considered any indications of the lack of desire for disclosure or testimony, and where I have decided that files should be produced I obviously believe that the necessities of this case outweigh any interest of the informant in not being disclosed.

I particularly have in mind, among other things, that these informants were very well compensated financially for their work and also I am convinced by the other materials in the record that they were well aware of the possibility that they might have to testify if circumstances made this necessary.

The next file to be produced is 148.

This is an informant who worked for the FBI over a period of several years informing both on the YSA and the SWP.

In addition to the most extensive reports, two or three times a month, on meetings and political, organizational matters, the kind of thing found throughout all of these files, there is a remarkable relaying of intimate personal information which is above and beyond what is found even in the extensive informing of this type in other files.

We have the most detailed description of the activities of SWP and YSA members as far as who they were living with, who their boy friends and girl friends were, employment, marriage plans, educational plans, physical descriptions, residences and phone numbers, et cetera, et cetera.

Of particular importance this informant was described by the FBI as its most valuable Trotskyite informant in a very large metropolitan area.

This informant received substantial compensation, up to $350 a month plus expenses.

Commencing during the time this lawsuit was pending, this informant provided the FBI with information about discussions, about the present lawsuit, discussions about the so-called political rights defense fund.

This informing went on for a period of ten months before the FBI said that it should be stopped.

There is no doubt in my mind that the plaintiffs should be able to pursue the question of whether confidential strategy information was provided by the FBI on the handling of the present lawsuit.

The answers to interrogatories carefully avoid disclosing a member list relating to the political rights defense fund, which was in fact produced to the FBI by this informant. Such information was called for in the interrogatories and the answers were incomplete and misleading

in not revealing the information.

There are other omissions from the documents listed in the answers to the interrogatories which were noted by me.

The description about the method of obtaining what documents were disclosed, the answer is unknown. It is just an imcomplete and misleading answer.

This informant has indicated the desire not to testify. However, as I said, I believe that this informant's disclosure of this file clearly outweighs any interest in confidentiality.

File No. 220 is the next one that I will describe. This informant held many posts of rank in the SWP chapter, and other entities. This informant was a delegate to national conventions, a financial director of the local branch, a member of the executive committee of the local branch at various times, director of a fund drive, and an alternate to a national convention.

I want to pause here to indicate something that I have discussed before, but I will describe it in some greater detail.

As we all know, one of the strongest arguments that has been made by the defendants in this case as to justification for a surveillance of the SWP has been the connection of the SWP with the so-called Fourth International.

This was probably the prime argument against the preliminary injunction which I entered in late 1973, I believe, and which was reversed by the Court of Appeals.

The argument both to me and to the Court of Appeals, in that argument there was very heavy reliance on the idea that surveillance of the SWP and the YSA was justified by this connection with the Fourth International.

This remains a very important issue in the case, and an issue which will have to be probed

carefully and thoroughly in discovery.

Now, some of the files which I am proposing should be produced involve information about Fourth International matters and about the factions which grew up within the Fourth International and within the American Party relating to something which I can't go into in detail now, but the parties are all aware of this, that is relating to certain resolutions passed by the Fourth International advocating violent activity in Latin America.

This caused a great factional dispute both in the International and in the American Party.

In some of these files that I am ordering produced, there is extensive material about discussions by the various factions and about the various factions and about the issues.

I regard it as most important to have this information produced in discovery so that it can be developed further. There is a serious question about these issues, about the Fourth International,

and the internationalist tendency, and so forth, whether they were really reflecting an actual plan or any actual activity of a criminal nature by the party members in the U.S. or whether they simply were reflected in academic and parliamentary and ideological discussions.

Now, File No. 220 relates to an informant who reported to the FBI extensively about the Fourth International, he reported on the speech by a Fourth International member named Livio Maitain at a convention. He reported about Fourth International matters discussed at a SWP plenum. The FBI listed as a topic of special interest with regard to this informant the Fourth International.

Aside from this, there is another informant who gave the most extensive personal information about SWP members, including the sexual preference, and, of course, the topic of homosexuality

which was related to that, pregnancies, marital infidelities, health and physical health and mental health problems, employment information, and so forth and so on.

A very large number of documents was produced by this informant to the FBI, including personal correspondence between members and personal correspondence between the organization entities and the members, as well as financial reports, and so forth. This informant was well-compensated, in one year earning more than $4,000.

This is a situation where it appears from the face of the summary given to me that the FBI at least desired to use this informant to disrupt the activities of the SWP. What actually happened would have to be gone into in further discovery. However, the files indicate that this informant was classified by the FBI as being in

the position to serve subtly as a deterrent. The answers to interrogatories give only the barest indication of the latter, and are misleading.

I should note at this point what is obvious, that even though the FBI may not expressly advocate or urge or instruct a particular informant to act as a disruptive force, there is an inherent disruptive force simply by the fact that informants occupy particularly officers and executive committee roles, policy-making roles where they have a very clear conflict of interest by virtue of their position as FBI informants.

At least that is a valid claim of the plaintiffs here, which they should have the opportunity to develop and, of course, the FBI should have the opportunity respond by way of their evidence and arguments.

The next file to be dealt with is 306.

This is an informant who functioned over a period of many, many years, and in addition to the extensive organizational and political reporting, a reporting on organization and political matters which the informants always gave the FBI, and in addition to the reporting of personal information, this is another instance where there was very extensive reporting to the FBI on Fourth International matters.

For instance, at a particular time, this informant reported on sending of Peter Camejo to Argentina. This informant reported about some matters relating to the Irish Republican Army. This informant reported about the SWP relationship with the Paris office of the Fourth International.

This informant apparently had information about the tactics of the various factions and discussed and reported to the FBI on it.

It should be noted that a total of about 1300 meetings of the SWP and related groups were reported by this informant to the FBI.

Again, as I mentioned, we have the reporting of intimate personal information, including sexual relationships, births, deaths in the families, social contacts, education, travel plans, names, addresses, physical descriptions.

There were reports about upcoming job interviews among other things.

This type of material is significant because of the activities which were claimed to have occurred by way of the FBI using this information to harm SWP members in prospective employment, family relationships, et cetera, by the use of poison pen letters and other methods.

Again, these are not issues that I am trying to make findings on, but I am trying to outline them as issues to be litigated.

In 1964, this informant was advised that he might have to testify. This informant has expressly advised the U.S. Attorney's office here that he would cooperate in a lawsuit. However, recently, apparently he has indicated an unwillingness to testify.

I should say here that I think it is obvious that many of these indications of unwillingness have come up very recently at a time when there is public and press criticism of intelligence gathering methods. But I do not regard such unwillingness under these circumstances as justification for a failure to disclose the files which I propopose to have disclosed.

Again, the answers to the interrogatories are misleading and incomplete in the ways that I have referred to with regard to other answers.

The next one to be dealt with is 311.

This is a situation where the informant was an actual member of the so-called internationalist

tendency. This is the faction of the American Party which purported to support the pro-violence resolution or resolutions in the Fourth International.

This informant held high positions in the SWP and the YSA. This informant furnished the FBI various extensive information on the so-called international tendency, including information about contributions of the SWP and the internationalist tendency to the Fourth International, of participation by other SWP members in the internationalist tendency, activities of members and leaders of the Fourth International in the United States.

He reported about members of the American Party being assigned to the Fourth International Headquarters in Paris.

He reported very extensive personal details about SWP and YSA members,including cohabitations, marriages, marital problems, drinking

habits, et cetera, et cetera.

He obtained and produced to the FBI large numbers of documents of a confidential nature, including a copy of a position paper which was drawn up by a Fourth International member, which was clearly regarded with the utmost confidence by the party members.

There is an indication that the FBI considered that he could be used for counter-intelligence purposes.

He chaired meetings both of the SWP chapter and the YSA chapter and of the internationalist tendency group.

He received substantial compensation, more than $3,000 in one year.

Prior to very recently, he had indicated that he would testify if necessary.

The answers to the interrogatories were incomplete and misleading. For instance, there

was no disclosure of the fact that this informant had produced to the FBI the confidential position paper relating to the Fourth International, and there was no indication of the fact which I believe the files indicate, that the informant considered that this paper could be used in disruption activities.

The answers to the interrogatories purport to describe how this informant obtained documents, and I think it is well to read this answer, which is simply false:

"The information furnished was obtained by informer through public distribution and postings on bulletin boards of handbills, fliers, bulletins, newsletters, campaign literature, as well as public sales of literature and newspapers, and was obtained from other members of SWP-YSA as well as through general membership distribution during SWP and YSA meetings and functions."

In a supplemental affidavit filed after the aforementioned Redfearn matter, the FBI supplemented this response by stating a number of documents were obtained through the informant's legal access to a member's apartment. The answer is still incomplete, because the answer failed to fairly describe the fact that the informant had regular access to confidential documents by virtue of his positions as (deleted by order of the District Court) of the Internationalist Tendency.

The next file which I would propose to be produced is No. 616.

This again is a situation where the informant revealed extensive information to the FBI about the Fourth International and its relationship to the SWP, in addition to the very extensive disclosure of documents and other information about political and organizational matters and personal

information.

This is a situation where there could well be an overt robbery because he provided to the FBI the minutes of the YSA national executive committee, which were under what was called secure lock.

My notes indicate something which I will say, subject to correction, because the actual pages from the answers to the interrogatories are missing, from what the Government has given me this morning, but the Government can check this out.

My notes indicate that the answers to the interrogatories indicated that the only documents that were produced were routine public information, and if this is the case, that was untrue.

The following addition was made in the supplemental affidavit:

"Furnished literature and copies of documents which were routinely distributed by SWP and YSA to its members, and copies of excerpts of

documents available to the informant in connection with the position outlined in question 2(g)."

Although interrogatory 2(g) was responsive to the narrow question asked -- whether the informant was a member of any YSA local executive committee -- it failed to give a full picture of the number of positions held by the informant, any of which could and undoubtedly did lead to the obtaining of documents.

The next file to be dealt with is 1123.

This is a situation where a SWP member or a YSA member was expelled because of the suspicion that the informant was in fact an informant. In effect, we have a situation where the activity is basically already known.

This informant was a member of a three-person executive board of the YSA, of the local chapter, delegate to the national convention, and local editor of the Militant.

In addition to providing the usual organizational information about political discussions and organization discussions, this is another instance of the most extensive information being provided about personal and confidential affairs of the YSA members, marital problems, drug use, extra-marital affairs, cohabitation of one kind or another, medical problems, educational and employment plans, et cetera.

This informant provided extensive quantities of documents.

This is a situation where the files indicate that this informant was instructed and urged by the FBI to carry out disruptive activities, informant discussion within the YSA.

I studied the answers to the interrogatories and find them incomplete and misleading.

I believe that we are at the ninth file now, and that is 1321.

This is an informant who served for two or three years, held positions on the executive committees in the large metropolitan branch of the SWP, literature director, secretary, and also was involved with a YSA chapter. The reporting covered hundreds of meetings of the SWP over a period of many years.

This informant utilized his position to obtain great quantities of private documents of the SWP and the YSA and provided them to the FBI.

This information received very substantial compensation.

One small point, although possibly significant as a method here, is the fact that this informant was engaged in helping clean a member's apartment, and during the course of that cleaning found an address book which the informant turned over to the FBI.

This informant had stated at times the

willingness to testify if necessary, and recently he has indicated an unwillingness to testify.

Again, the answers to the interrogatories are incomplete and misleading.

Before I get to the files which I am not proposing to produce, I want to make one further general point: That is that among all the other things which these files show, which bear very crucially on the issues of this action, is whether or not by virtue of this long and intensive surveillance by the FBI, the FBI ever picked up any information about criminal or violent or revolutionary activities.

I would not attempt to make any finding on that, but I have done a fair amount of work in reviewing the files and the very extensive summaries of these files, and what generally appears from the files, and this is subject to further development in the litigation, but I

think it is important to discuss even for discovery purposes, that generally what appears to have occurred is that these informants were conducting the surveillance over a period of many, many years.

What they provided the FBI with was a consistent recital of peaceful, lawful, political activities, peaceful, lawful, personal activities, and a total absence of any criminal activities or plans of any nature whatever.

There may be slight exceptions to that, but they apparently are either rare or non-existent.

There is a very serious question about whe ther there could be any justification for this exceedingly close surveillance after this kind of record had been developed for a period of a number of years, that is, the surveillance with absolutely no indication of violent or criminal activity.

It raises a serious question as to why the FBI surveillance of these people and these organizations and these chapters was not discontinued, at least a decade or two decades or three decades ago, if it ever had any justification whatever.

Again, I am making no findings, but these are the issues which -- these are among the issues which make these files relevant and make totally incredible to me any argument that they are irrelevant and useless to this litigation.

I will go through with very,very little discussion the files that I am not ordering produced because I think the important thing is to get the response of the FBI and Justice Department to this proposal. However, I have given you the numbers.

Basically, what I feel is that these are situations where the evidence can be developed

without the identification of the particular informant. I think these probably are typical of many other files where we are going to have to work out some method of summerization and where the particular individual -- there is no need for the disclosure of that person. I find no reason to think that the plaintiffs would need to interview the person, take the deposition, or follow up further on this information.

(Deleted by order of the District Court)

In the case of No. 162, 1211, and 1121, these were non-member informants. For instance, a bank employee who gave information about banking transactions or a janitor who looked through trash, or somebody in the employ of a university who looked at the university files.

I don't for a minute say that these things are not relevant, but I must say that I see no utility in knowing that it was Mr. X or Mr. Y

versus just getting the information, having the information as to the nature of the activity in dealing on an anonymous basis.

That concludes my discussion. I would hope and I will direct that the transcript be typed up immediately, and I will expect that the U.S. Attorney's office and the FBI will consider carefully what is proposed.

The idea, as we know, is to indicate whether the production of these files could go forward without appellate review. The FBI would not, in my view, be -- it would not be a consent, actually, the only indication that we are concerned about is an indication as to whether this procedure would lead to further appellate review and further delay. That is really the issue.

I think that you can announce your position without really ultimately expressing it or consenting to it. Anyway, you can figure that out.

I would propose, if the FBI will state that it will not seek appellate review, then I would vacate my order of last spring, and then embody this proposal in some kind of an order, turn it into an order, and this would permit us to proceed forthwith with the discovery proceedings in this action. I would also intend, of course, to go forward with discovery of all other fronts including immediately entertaining the discovery requests made by the Government on the Fourth International subject.

I would hope very much to rule in that quickly and get this case ready for trial.

MR. JORDAN: Your Honor, I have one request, and that is in all of these proceedings on this issue up to now, even the in camera ones, Mr. Stapleton has been present and given access to the transcripts.

THE COURT: Do you have any objection to

Mr. Stapleton --

MR. MOSELEY: No, we have no objection, provided that it is limited to Mr. Stapleton. He has honored the confidentiality.

THE COURT: He certainly has.

Thank you very much.

APPENDIX F

Proceedings Before the District Court, February 10, 1978

MR. WOHL: * * *

Therefore, if the government were to comply with the disclosure order, it would in effect moot any confidentiality privilege that it has. The only way that it could obtain appellate review would be submitting to sanctions and seeking appellate review at the time of a final judgment. I don't mean to suggest by that or imply that even if appellate review were completed and the Supreme Court ordered the disclosure of certain files, that the government would comply with the disclosure order rather than accept sanctions.

* * *

THE COURT: I think that if and when the time comes when we are faced with this question of the refusal of the FBI to obey a final order for production of files, which I oppose, and if and when the time comes when we are faced with

what you spoke of at some length, this question of the refusal of the FBI to produce and the willingness to accept sanctions, that I would regard as a very unfortunate event as far as the public and the law enforcement processes and the justice processes of this country are concerned.

But I can't deal with that in advance. I will face it when and if it comes. I hope it never comes. We have a case where the claim is made that informants were not used for valid law enforcement purposes, but were used for purposes entirely divorced from any valid law enforcement motive. That is the basic nature of this important segment of this case. It goes without saying that this is not a frivolous, imaginary claim. Every development in the case thus far has added strength to that claim, rather than going the other way. I remain in a position where I realize that I am not deciding the case on the merits; I have said that many times and I remain

in that position, obviously.

But I am dealing with the question of how grave and how serious the questions are that are raised in order to determine whether to be involved in this difficult discovery. And there simply is no doubt that the questions are grave. You have a Senate Committee which made certain findings on the subject of the FBI's treatment of the Socialist Workers Party and the YSA, and we have the record in this case, and really, very little more needs to be said.

I have heard and carefully considered all the evidence, including the general evidence about law enforcement purposes and the relation of the informant confidentiality, and I have considered the specific files. I think I have said this before, but I am going to say it again: I do not accept the idea that it will prejudice the FBI in its valid law enforcement objectives in order

to turn over files of persons who engaged in surveillance of people who, as far as all the evidence I have seen is concerned, planned no crime, committed no crime, and did nothing but engage in peaceful activities.

To turn over such files seems to me to make little or no threat to the validity of informant programs in areas of valid law enforcement. People are informants as you and I well know, in the valid criminal areas for a host of motives. Many of them motives of self-interest. And I think that to assume that the psychology -- the psychological reaction of valid criminal informants is going to be all jeopardized and thrown into -- and destroyed or even jeopardized by the production in this case, I really think involves a psychological judgment which I just cannot accept.

The converse is to permit the FBI to con-

ceal instances of possible serious wrongdoing and serious violation of constitutional rights under the guise of the need to protect valid law enforcement objectives again strikes me as somewhat of a travesty. All right.

That is a way of saying that I very much hope that the FBI and the Department of Justice never confront the Court with this defiance and refusal to turn over in the statement, "We will accept sanctions." I am not sure that any type of sanction would really substitute for the value of the public interest in having this case tried and having the facts exposed to the public.

There is a value to that which is in the interest of our constitutional processes. But we may not ever have to reach that, and I hope we don't. But as far as where we are now, I will give you the opportunity this afternoon to do what I asked you to do the other day, and that

is to specify any of these proposed disclosures which the government feels would involve a breach of discretion or abuse of discretion under the applicable law.

* * *

I will, and I know it's late, but I am going to ask you if you wish to indicate those instances, Mr. Wohl, where you can argue that there was an abuse of discretion by production of these files.

MR. WOHL: At the outset on that score, I'd like to say that as a general matter we would regard it as extremely imprudent on our part to take a position in court that discretion had been correctly exercised without further talking to the informant to make sure that we and the Court had not perhaps overlooked something of great significance that the informant would point out immediately.

THE COURT: Look, Mr. Wohl. The Department has had a year and half to produce evidence on this motion. You are really now talking about finding out other evidence. And of all the things that have been suggested, that is probably the least appropriate. It just is not appropriate, you can refuse to tell me what your position is --

MR. WOHL: I'm not saying that, your Honor.

THE COURT: But I just cannot conceive of going out now and gathering further evidence; I suppose it would be in the form of affidavits from somebody that they have a particular situation. There has been plenty of opportunity for that. All right. Go ahead.

MR. WOHL: In any event, just by way of explaining what our position is, I am saying that we think that is a conditional thing that is a prerequisite to our taking a position that dis-

cretion was correctly exercised.

Now, with respect to arguments as to why it was incorreclty exercised, we would make -- and in addition, I would say that we would believe that if the Court saw any ambiguity in the summary or the file, there certainly would be appropriate procedures by which the Court could call for in camera questioning of the informant or the FBI agent. With that having been said --

THE COURT: I resolved any doubts against production.

MR. WOHL: All right.

THE COURT: And to me there was no ambiguity of the kind that would mitigate in favor of further hearings.

MR. WOHL: That having been said and also preliminarily, I'd like to say that I am not going to go into detail because we think that involves a serious danger of inadvertent disclosure and we are indeed concerned that some

of the informants may have become known to counsel for the plaintiff through the prior proceedings that we have had. And that is why my remarks would be rather general. If we feel the need to supplement that with anything specific, or the Court requests it, we would ask that it be allowed to be done through some form of ex parte submission.

MR. BOUDIN: Ex parte?

MR. WOHL: Yes.

MR. BOUDIN: You mean without us participating?

MR. WOHL: That's right. But I'm saying there may have been a danger that some of the informants may have been exposed. That having been said we feel that the Court inadequately weighed the consideration of the physical danger to the informant.

THE COURT: Is this a general comment?

MR. WOHL: Yes. And I'd like to say --

THE COURT: In other words, this would apply to all.

MR. WOHL: Well, it applies most particularly to one informant. That is No. 616.

THE COURT: Look, Mr. Wohl, I think it would help if you are just as clearcut now as you were in your earlier statement. That is, if the government would take the position that there was an abuse of discretion as to all of these, then you take that position.

If you take the position that there is an abuse of discretion as to particular ones, then you take that position. All I wish to kncw is what is your position.

MR. WOHL: Our position is that there certainly was an abuse of discretion as to some of the informants.

THE COURT: Which ones?

MR. WOHL: If I could just go on to say as to others of the informants, we are not in a

position to say that at this time because we feel we have to talk to them first.

As to Informant No. 616 -- and in addition, what I'd like to say is that it's the government's view that the Court considered some factors which should not have been considered at all and had no place in the balancing.

THE COURT: Just be as specific as you can.

MR. WOHL: On the factors or on the informant? I can do it either way. I was about to say with respect to --

THE COURT: What I really wanted you -- the main thing that I would appreciate knowing is whether you argue that there was an abuse of discretion as to all or to certain ones, and if it's the latter, which ones.

What you have told me is, so far, in response to that, that you feel now that there was an abuse of discretion as to some, and depending on what

information is gained from the discussions with the informants themselves, you may conclude that there is an abuse of discretion as to the others.

MR. WOHL: Right.

THE COURT: But in order to make some progress in the analysis, why don't you go through and apprise me of what the cases are where you now have concluded that there was an abuse of discretion, and outline whatever factors you wish to outline,and if you repeat one factor several times, I would not worry about it. The repetition is not of concern.

You started with 616.

MR. WOHL: The primary consideration there is the physical danger to the informant that would result from disclosure. We think that that is made clear on Page 32, Paragraph 3 of the informant's summary. We think that that is further clarified by the file that backs up that particular paragraph.

THE COURT: Just give me a minute.

MR. WOHL: Then I would repeat that I would request that we not have a detailed discussion of the information from the files.

THE COURT: I am just listening to you. Anything else on 616?

MR. WOHL: Just that your Honor referred apparently to an overt robbery --

MR. BOUDIN: Possible overt robbery, was the expression at Page 25.

MR WOHL: And we believe that to the extent that there was a conclusion of an overt robbery, that is at least not confirmed by the summary and if there is any ambiguity about it we think in the circumstances of this informant that should have been inquired into further.

I have a number of general factors which I think apply to several informants. I appreciate your Honor said that I could repeat them, but my

notes are not organized in quite that fashion. So what I'd like to do is go through each informant indicating what our objections are and then summarize the general factors after that, so as to make our position complete; emphasizing that it's very possible that our investigation that is going on during this period could cause us during the next week to ten days to withdraw our observations to certain of the orders -- or with the orders with respect to particular informants.

THE COURT: Let me say just on 616 I noted in my notes from the summaries the point that this informant had a fear of physical harm if identified. I took that in consideration, and in my view that fear expressed by the informant was outweighed by the importance of the information to the case which this informant could provide. And as far as the statement about the possible robbery, I was referring to something which was expressly

brought out in the file, that documents were taken, minutes of an executive committee, minutes of an YSA National Executive Committee were taken which were under what was called secure lock.

As in all discovery, the files don't answer all of the questions, but they raise serious questions which are worth exploring. So those matters were considered. If it helps you -- the only thing I ask, if you are going to talk about general considerations applicable to several files, just name the files.

MR. WOHL: That is what I am saying. I don't have my notes organized in that fashion, but I think their considerations are clear enough so it's pretty simple to go back to each one.

As to 53, our view again is that there in that situation is a substantial likelihood of considerable economic injury to the informant and the informant's family and that that injury would appear to be significantly greater than any injury

the informant even given the best case for plaintiffs, might have inflicted on plaintiffs. We also think --

THE COURT: Let me say that I specifically noted the alleged fear of this informant about what you are talking about, which was possible employment problem within the family. Again, it was a matter of weighing what I considered to be the value to the case, the essential nature of the evidence against the claim of this kind.

I wasn't considering that this informant had inflicted injury of an economic nature. I don't know that that is a particular consideration. But the point is that this informant, as I expressed it, had gained accesss to members of the SWP and the files in a unique way, and illustrated a type of activity which is important to be brought out in the case. But I certainly did consider the claim about economic injury.

Go ahead.

MR. WOHL: We realize that your Honor was attempting to be rather general in your Honor's statements so as to not inadvertently reveal informants, and we would hope that in the event you felt the necessity to make more detailed findings or statements you would do so in some kind of a limited opinion for the Court of Appeals.

THE COURT: I have no intention -- at the present time, I feel no need of doing that.

MR. WOHL: I am just putting on the record our view.

THE COURT: I think the statements are sufficient to show the consideration, and I think they are sufficiently general so as to not reveal anybody.

MR. WOHL: In any event, as to 53 and the other one I referred to earlier, 616, the government would request an opportunity to put in some form of affidavit to clarify and strengthen the

considerations it's relying on.

As to 148, again we believe that not enough weight was given to the fear of the possibility of economic reprisals with respect to this informant. We also think that the Court made a possible factual error with respect to a statement concerning a membership list. We think that a close reading of the summary, as well as the file backing it up at least leaves it quite ambiguous as to whether such a membership list was ever obtained, and if anything points in the direction against that inference, and again we believe that if the Court was arriving at such conclusion, an additional factual inquiry should have been ordered.

I'd like to just check my notes on 148 to see if we have anything else. Also here, as with respect to other informants the Court relies on substantial reporting of personal details by the informant. We believe that that was a common

practice concerning all informants and that the disclosure of any informant identities in addition to the ones that have already been disclosed for that purpose is inappropriate.

We do not agree with the Court's inference that the reporting by this informant-- I will withdraw that. If I am not mistaken on 148, that was the one in which the statement was made by an agent that this informant was a particularly effective informant. We think that that conclusion is a particularly inappropriate basis on which to order turnover, because that suggests that informants who are of the greatest value to law enforcement are most likely to be turned over, and that is why that we think is particularly an inappropriate consideration.

That completes what I have before me concerning 148.

THE COURT: I was fully cognizant of the

claim of this informant that the informant did not wish to be revealed because of embarrassment with friends and possible loss of job. That was far outweighed by the importance of the evidence and the statement really speaks for itself. As far as the membership list, I have commented here as I did in several cases about what I consider to be discrepancies in the answers to interrogatories.

I did this for the record as long as I had gone through the process of comparing the summaries with these answers to interrogatories. I did this because at times, including in the Court of Appeals, the government has made a great deal of the argument that ample information has already been given, and I think that it should be stated for the record that the answers to interrogatories, first of all, were never intended to be complete discovery; second, to the extent that they asked for information, in many instances the information was not completely given.

But I think I made it clear in my statement, and I will now, that the fact that there was some discrepancy between the facts and the answers to interrogatories, that is not a controlling factor to me, because as I have said, the answers to interrogatories were never intended to be more than practically an introduction to the subject. So that is what this membership list thing relates to, and it's really not a controlling consequence.

As far as this informant, this is an informant with -- the importance of this informant not in a law enforcement objective, but in something which from the evidence is something else, that is the reason for suggesting, proposing the production. Finally, as I indicated, the attempt was to some extent to have prototypes here, and the fact that certain of these informants did the same things, for instance, report on personal information, there may develop a certain repe-

titious or cumulative nature to some of this material.

But we have to realize that we are now dealing with eight files of informants, of member informants or confidants of members, out of somewhere over -- 00 [illegible]. There was prior production of a small number. And after looking at this evidence, I am convinced that the realistic picture of the evidence cannot be gained without some revelation of the details.

There simply is no substitute for what is seen in these files, as far as the details of this activity. Now, to say that the disclosure of this detailed evidence should be cut off at five files or 13 files, that is a difficult judgment. But I weighed that as carefully as I could; the desire to avoid similarly repetition and useless cumulation. And I took that into account when I viewed these files as necessary, particularly because they had certain features in common, which added

together helped to present the evidence clearer, would help and really was essential to the presence of the evidence partly because in each case they had certain unique features.

* * *

[O]bviously if the government came up with a strong factor which I had not considered, and which made me realize that my proposal was in error, I would be arbitrary in not listening to it and changing my proposal.

That is the reason I asked for this. Thus far, I must tell you I have not heard anything of that kind. But I want to hear it, and if you will bear with me, I will hear the rest of this. I don't think it will take long.

Would you go ahead.

MR. WOHL: Yes, your Honor.

With respect to Informant No. 6, that is

the one where the informant's activities, we believe, can be summarized in a manner that would be useful to the litigation, or adequately useful to the litigation to satisfy the needs of the plaintiffs. And we noticed on this particular one, it seemed that your Honor considered the length of the smmary as being of significance.

And we think it's appropriate to point out that part way through the summarization process, I am informed that the Court communicated to the government that the summaries were too long and therefore the agents who were preparing them should be instructed to try and pare them down and not make them so long. So as a consequence the length of the summary itself has a lot more to do with the summarization, and we think that is an erroneous factor to consider.

THE COURT: Anything else on 6?

MR. WOHL: If I could just have a moment.

(Pause.)

MR. WOHL: It appears to us that this summary indicates that the information that this informant obtained was information he was entitled to obtain, and as in most informant type situations, when parties deal with people, they are taking the chance that that person to whom they voluntarily disclose information might turn it over to the government.

Again, this is one that relates to the reporting of personal information. We believe that that can be put into the litigation without the identities. The government is prepared to admit that that was quite commonplace. That's all I have at this time on 6, your Honor.

THE COURT: You totally misconceive the basis for proposing that production of No. 6. There is no indication for any extensive discussion. I think your arguments are really -- they are just not even worth talking about.

MR. WOHL: All right. We have in effect specifically related to 220. We make the same point with respect to the summarization.

THE COURT: Anything else on 220?

MR. WOHL: We would like to provide additional evidence concerning this informant's physical condition and just as a general matter we don't see how this one would benefit the plaintiffs in the prosecution of their causes of action.

That's all we have on 220.

THE COURT: Again, your point misconceives the purpose of proposing the production of this. This is not an informant of advanced age, there is no indication in the entire time that this matter has been before me, there's been no indication that there is any problem about the physical condition of the informant which would be a factor.

MR. WOHL: This informant has apparently recently suffered physical disablement.

THE COURT: I would say this, if we get to the point of specifically dealing with this, there would be specific protections imposed that are appropriate. But this is an informant whose file is of tremendous importance to the case and should be produced.

Go ahead.

MR. WOHL: The observation we would make on 306, which is again another informant that we have not talked to is from the file it appears that we have the same situation of possibility of developing this information without revealing the identity.

THE COURT: Obviously if I had thought that I wouldn't have ordered production or suggested production.

MR. WOHL: On 311 we have the same thought concerning the ability to summarize the file or provide the information without the identity. The only indication that we saw of your Honor's reason-

ing was the -- I believe there is a reference to his membership in a particular faction or group. And while we can see why that might be a reason why the government might want to use that informant as a witness, we don't see how it's a reason why the plaintiffs are entitled to require disclosure of the informant.

THE COURT: I don't understand why you don't see that. There are two sides to every argument, and where the government may wish to prove that the connection with the Fourth International involved a danger and a reason for FBI surveillance, which was what was argued in the Court of Appeals on the preliminary injunction back in 1973, by the same token it would be open to the plaintiffs to introduce or attempt to introduce evidence that this association with the Fourth International led to nothing but peaceful debate, either among all the party or the majority of the party or whatever

the facts may be.

In other words, if the files about the Fourth International and the Internationalist tendency show that the discussions were peaceful discussions about ideology and about parliamentary, internal parliamentary maneuvering, et cetera, then this is material which is relevant to the defense of this case, just as it may be relevant to the -- not to the defense, but to the plaintiffs' position in the case, just as it may be relevant to the government's position.

In other words, it's relevant to an issue and it seems to me it's inappropriate to try to figure out at this point who it helps or who it hurts. It's similarly relevant to an issue. It's an issue which is somewhat hard to get evidence on and I regard that the files where the informants were involved with the Fourth International or Internationalist tendency as uniquely important.

MR. WOHL: If I could put our position on the record with respect to that, as we regard it, the International tendency and Fourth Internationalist issue is one put into the case primarily by the government as a defense. The question then becomes what evidence the plaintiffs are entitled to to rebut that. The only type of evidence in order to decide what you would use as rebuttal, it would seem there has to be some clarification of what the evidence of the defense is. Because if you have evidence that says somebody did something at a particular time and that caused the FBI to be justified in its suspicions or at least be prudent to go forward, the fact that somebody else can come in and testify that at some other occasion, these fellows were all nice fellows, we don't see as being directly related to that issue.

THE COURT: I think it is immaterial -- in the first place, the issue is in the case. It was

raised, it was the major feature of the government's position in the Court of Appeals. It has been talked about in briefs, in affidavits, at great length in various connections. It is the subject of a pending application by the government for discovery.

To say that the plaintiffs are supposed to wait until they hear the government's case and then have discovery and what they might do by way of rebuttal, it's totally impractical. I just reject it. What other arguments?

MR. WOHL: 1123 is one with respect to which the government can't really respond without talking to the informant. Therefore it's correct to say that I suppose at this time we have no specific point to make with respect to your Honor's exercise of discretion concerning that informant.

THE COURT: All right. That covered eight of the nine files. Obviously the ninth is 1321.

MR. WOHL: On 1321 we again see this informant as having nothing really unique other than just additional detail, and we think that if there is a possibility of pulling together this type of information through some kind of a summarization process, we think that 1321 is a good candidate for that sort of a process.

That is what I think we could make an objection along that line. Your Honor has asked us to state our legal position as of now. I think as to 1321 that is the one as to which there is the greatest likelihood that after our investigation we will withdraw our objection to your Honor's exercise of discretion. But at the present time on the state of the current record, I have said what our position is.

THE COURT: I think it's good to have that. We have objections now on nine out of the nine, which is an interesting response to the proposal,

and an interesting follow up to the strenuous plea to the Court of Appeals that the District Court should make a case by case evaluation.

And I will write a memorandum to the Court of Appeals the first of the week and apprise them of the position the government has taken. And of course the transcript is here so there is no -- there will be no occasion for any mistakes.

Thank you very much. It's very late and I think we should terminate.

MR. WOHL: May the record reflect that we have not completed our presentation of our view?

THE COURT: What do you mean by that? I will afford you as much more time as you wish tonight to complete it.

MR. WOHL: Thank you, your Honor.

Now, as I was saying, and I appreciate your Honor's patience, it could very well be that if we were allowed to respond a week from now, we

might not be objecting to all nine. So -- and I'd just like that to be very clear in case there is any doubt about it.

THE COURT: You mean because of getting the consents of the informants?

MR. WOHL: And because our investigation would convince us that it would be proper to turn over the files.

THE COURT: At any time when you withdraw, you change you position, why, you are free to apprise the Court.

MR. WOHL: Okay. Besides the specific analysis that I have gone through, I'd just like to put on the record the -- inappropriate where we believe that the Court considered factors which just should not have been considered.

The Court considered apparently in one or more circumstances the amount of money that the informant received. We believe that this is not

an appropriate consideration. Also the Court at least adverted to the errors in answers to interrogatories --

THE COURT: I dealt with that.

MR. WOHL: I just wanted to explain that in response to the Court's comments we have asked, originally immediately asked the FBI to look into that and explain their viewpoint and we had asked to have a written submission which would be ready next week on that point, but we have moved ahead on other points, points we feel more critical, but I want the Court to know that there will be a submission forthcoming on that.

That completes our position with respect to what our current response has to be at this time.

* * *

APPENDIX G

Proceedings Before the District Court of February 22, 1978

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THE COURT:

* * *

It is not acceptable to me and -- if it had been anything that the plaintiffs were willing to accept from their standpoint, I would have considered it, but it is not and your suggestion is something which the plaintiffs object to, and from my standpoint, as the Court, I take responsibility for this proposal, even somewhat independent of the plaintiffs because I am the one who has seen the files and I made my proposal, and under the circumstances I had to, on the basis of an ex parte review of the files, or an in camera review of the files, and your suggestion, the Government's suggestion, is not acceptable.

I really don't think I have go to into detail. When I reviewed these 18 files I

reviewed it with the idea that the result of my review was that the nine was the minimum number which really could be taken from this group of 18 and which could have some hope of satisfying legitimate discovery objectives of the plaintiffs.

I still regard it as minimal. I think it presents some -- even the production of the nine, which is nine short of the 18 files, presents disadvantages to the plaintiffs which, unfortunately, they, not having seen the files, can't really argue about.

The order that I entered on May 31 was a much more satisfactory order in respect to the handling of this case because it gives the opportunity to plaintiff's counsel to review, argue about and deal with 18 files.

If we cut it down to nine files on the basis of my review and my judgment, that is already a reduction by 50 percent from what was requested by the plaintiffs.

To cut it down to four is something that in all fairness I could not countenance.

I feel an obligation -- since the plaintiffs have really not had any opportunity to see at any time the details of these files, I cannot simply bargain in this fashion and cut down to four the number of files to be produced. It would be grossly unfair and I will not do it.

The sole reason for the cut is the absence of consents of these informants and you must know that there is no justification for making that a condition. So the proposal as of now is rejected. I will do nothing further to deal with this proposal. The record is clear what the Government's attitude has been in response to the -- to what they argued too strenously about in the petition for rehearing, and in the event that it is necessary to bring that to the attention of the Court of Appeals or the Supreme Court,

why, the record is there for what it's worth.

As far as this question of sanctions, I think it is premature to get into that. I appreciate your warning and I will state to you and to the FBI that as far as I can see now it is not tolerable or acceptable to this Court to be told that the FBI will defy the order of the Court and accept what you call sanctions.

The purpose of discovery is not to lead to sanctions, it is to lead to discovery. The purpose of the Court order after all the litigation that we will have gone through by the time any official order is entered, is to get the order obeyed and I think you better reconsider any suggestion, even in advance, of the thought of sanctions. It will not be acceptable to me.

As long as you have suggested it, I want to give you advance notice that I will seriously consider contempt or imprisonment of defiant

officials, and I am sure you are aware of that, but I will not hesitate to use that power if there is a wilful defiance of a final order of this Court.

I want to know right now who has custody of those files. Where are they physically located?

MR. MOSELEY: Your Honor, custody physically of the files right now is, as to the nine for which I believe no disclosure is ordered, custody is in my office.

As to custody of the others, we had sent them down so that copies could be made and redactions could take place for this proposal, were it to be accepted.

THE COURT: I am directing you now to have all files -- that all files be brought to your office. They should be in this Courthouse and in this Disctict.

MR. MOSELEY: Within my office, your Honor?

THE COURT: Absolutely. Those files I am directing you, and I am directing the FBI, to have those files brought to the United States Attorney's office in the Southern District of New York immediately.

I am very hopeful that this unpleasant problem will never arise, but if it is necessary to entertain contempt proceedings against anyone, it is my view that the United States Attorney's office should be regarded as an attorney, not a custodian of the documents -- and I am perhaps disregarding the physical situation now, but I think formally this is the way the legal issue should shape up, I think that the matter, as far as contempt, would necessarily be a matter involving some person or persons at the FBI.

The United States Attorney's office, like any attorney, is simply representing a client and acting on instructions which any attorney must do.

I would not envision under any circumstances any contempt proceedings involving a United States Attorney.

What I really meant as far as the custody, I think that if this issue has to be dealt with -- I think that the Government -- although it may take a position that disagrees with my views, it is doing so seriously and not playing any games about it, and I think that the documents, the files, should be formally treated as in the custody of the FBI in New York City so that the issue can be joined in that way and nobody has to worry about geography of Washington versus New York.

Do you get my point?

MR. MOSELEY: I understand that, your Honor.

THE COURT: I am merely asking that the files be brought to New York. I will consider

them formally under the custody and direction of the FBI, although obviously the U.S. Attorney's office has to deal with them.

I will assume that in your dealing with them you are either dealing with them under instructions of the FBI or instructions of the Court.

So you are not personally liable for whatever happens to the documents. Do you get my point?

MR. MOSELEY: I understand that, your Honor.

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APPENDIX H

Proceedings Before the District Court of March 10, 1978

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THE COURT: * * *

I would like at this point to summarize very briefly the chronology of the events as follows:

The original motion which led to the proceedings was made on August 3, 1976 and that was a motion for the production of 19 FBI informant files. Those files were identified by numbers. No names or identities were contained in the motion nor have any names or identities ever been made public in any regard, but the numbers were taken from answers to interrogatories which were coded by number and revealed certain skeletal information about the informants without disclosing any identities.

As I said, that motion was made August 3, 1976.

During the ensuing months there were proceedings consisting of the submission of affidavits, consisting of the testimony of one or more FBI officials and most importantly of all consisting of the review by the District Court in camera of certain of the files themselves and the obtaining of lengthy summaries of the vastly more lengthy files, these summaries being prepared by the FBI and the United States Attorney's office.

Those summaries and the files have thus far been entirely and completely examined by the District Court under seal and no disclosure has thus far been made of any portion of those files or any portion of these summaries to plaintiffs' attorneys or to anyone else.

It was my view and remains my view that the matter of dealing with informant files is a matter which must be approached with great deliberation and that's the way in which I intend

to approach it.

After a review of the files, which was incidentally not suggested by the government or by even the plaintiffs but was entirely at my own insistence, I made an order on May 31, 1977 to the effect that the 19 files -- it may have been reduced to 18 by then -- that's right, by May 31st the matter in controversy had been reduced to 18 files. One file was no longer in controversy. I directed that the 18 files be produced to four specified attorneys representing plaintiffs and I directed that this be done under the strictest confidentiality and that the plaintiffs' attorneys were to inspect these files and make use of the information therein entirely on a confidential basis and they were to disclose no information obtained from these files, either to the public or even to their clients unless they were specifically authorized to do so by the Court.

I had the express agreement of Mr. Boudin and his associates that this direction of confidentiality would be scrupulously complied with. Beyond this, I directed that the procedure itself remain a matter of confidence and that it be disclosed to no one outside the number of the four persons, Mr. Boudin and his three associates and I believe that I have permitted knowledge of the procedure to be given to Mr. Stapleton of the SWP, but those five persons were not to disclose even the procedure to anyone outside their number, either other plaintiffs or the press or anyone else.

I think it should be noted that that latter direction was adhered to to the letter as far as I know and there has never been any contention by the government to the contrary.

No notice of that procedure ever appeared in the press until the government brought the matter to the Court of Appeals and the Court of Appeals

directed that the proceeding be made public. Of course the Court of Appeals was not directing that the information in the informant files be made public but it directed that the proceeding, the nature of the proceeding be made public, but until then there was to my knowledge no leakage whatever.

And I note this to confirm what I am thoroughly assured of and that is the reliability of plaintiffs' counsel and their willingness to scrupulously obey any directions of the Court as faw as confidentiality.

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